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No.

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
October Term, 1989

THE HENRY AND WARREN CORPORATION,
Petitioner,

vs.

COBBLE HILL NURSING HOME, INC.,
Respondent,

and

DAVID AXELROD, M.D., COMMISSIONER OF THE STATE OF NEW YORK DEPARTMENT OF HEALTH,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals of the State of New York denied the Petitioner due process under the Fourteenth Amendment of the United States Constitution by granting judgment to the Respondent, COBBLE HILL NURSING HOME, INC., when it failed to provide the Petitioner a hearing;

(a) to present witnesses and documentary evidence to determine the numerous factual issues surrounding the formation of the contract and the intent of the parties to the price, especially when the parties stipulated that a hearing was to be held.

(b) to determine whether a Court of Equity should grant specific performance, where by virtue of the opinion of the Court of Appeals the Petitioner was precluded from presenting evidence that specific performance was an inequitable and inappropriate remedy under the circumstances.

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DAVID AXELROD, M.D., COMMISSIONER OF THE STATE OF NEW YORK DEPARTMENT OF HEALTH,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

1. The judgment of the New York State Court of Appeals sought to be reviewed is dated November 21, 1989.

2. A motion for leave to reargue before the New York State Court of Appeals was denied on February 22, 1990. This petition was filed within ninety days from the denial of reargument.

3. The statutory provision believed to confer on this Court jurisdiction to review the judgment in question by Writ of Certiorari is U.S. Supreme Court Rule 17(b)(c) 28 U.S.C.A.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V:
. . . Nor shall any person . . . be deprived of life, liberty, or property, without due process of law.

United States Constitution, Amendment XIV:
. . . Nor shall any State deprive any person of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

This action was commenced in June 1980 by the Respondent, COBBLE HILL NURSING HOME, INC., for the specific performance of an option provision contained in a lease agreement between the Petitioner, THE HENRY AND WARREN CORPORATION and the Respondent, COBBLE HILL NURSING HOME, INC., dated May 17, 1976.

In 1975 Eugene Hollander, a principal of the Petitioner, THE HENRY AND WARREN CORPORATION, was indicted by both the State and Federal Courts for medicaid fraud and grand larceny. In the State court, Mr. Hollander entered a plea of guilty and was fined $1,000,000.00 and sentenced for five years probation.

In May 1976 Mr. Hollander was scheduled to appear in the Eastern District of New York before the Honorable Jack B. Weinstein to enter a plea of guilty. It has previously been agreed between the United States Attorney General's Office and the attorney for Mr. Hollander that a condition to the entry of the plea of guilty would be that Mr. Hollander would be forever barred from operating nursing homes. He would, however, be permitted to continue as owner of the nursing homes which he already owned.

Mr. Hollander, as principal of HENRY AND WARREN CORPORATION, agreed to enter into a receivership agreement with the Department of Health of the State of New York whereby he ceded operation of the Congress nursing home to the Department of Health. A lease was entered into between the Petitioner, the owner of the nursing home located in Brooklyn Heights, and Cobble Hill as receiver of the nursing home.

On May 17, 1976, the day before Mr. Hollander's scheduled sentence, before Judge Weinstein in the Eastern District of New York, both the receivership agreement and lease were presented to Mr. Hollander for execution. Over objection, Mr. Hollander was compelled to sign the receivership agreement and lease, containing an option to purchase. Mr. Hollander signed these agreements under the threat that if he failed to do so, the Special Prosecutor's Office would ask Judge Weinstein that he be incarcerated, and under the further threat that if he failed to sign, the nursing home license would be revoked and the 520 patients removed.

On November 30, 1979 the Respondent, COBBLE HILL NURSING HOME, INC., purported to exercise the option to purchase contained in the lease agreement (32a). The exercise of this option was rejected by the Petitioner on the ground that the price fixed by the Commissioner of Health, $3,046,442.00, was arbitrary, capricious, confiscatory and had no relation to the market value upon which the Commissioner's determination was to be based, and further, that the opinion was invalid for lack of an essential term, the price to be paid.

The Commissioner arrived at the price fixed by him by taking the historical cost of construction, $4,123,751.00, deducting all rent payments made by the Petitioner from 1976 to 1979 and arriving at the figure of $3,046,442.00 (63a-64a). The Commissioner determined that the option agreement provided for the sale of the property for cost, less any sums received for reimbursement.

The option provision upon which the Commissioner based his determination states as follows:

> During the term of the Lease (Plaintiff) shall have an option to purchase the premises (including without limitation the improvements thereon and the items set forth on the inventory) at any time during said term at a price determined by the Department in accordance with the Public Health Law and all applicable rules and regulations of the Department without prejudice to the remedies, if any, of the parties herein.

In June 1980 this action was commenced by the Respondent, COBBLE HILL NURSING HOME, INC., for the specific performance of this alleged option (29a). On October 31, 1985 the Respondent, COBBLE HILL NURSING HOME, INC., made a motion for summary judgment. The Petitioner and Respondent, COBBLE HILL NURSING HOME, INC., upon the return of the motion, entered into a stipulation (43a-45a) whereby it was agreed that the motion for summary judgment should be granted, that the Respondent, COBBLE HILL NURSING HOME, INC., would withdraw all its defenses and that all matters financial including the methodology of arriving at the price would be determined at a full trial.

Upon the motion to disqualify a referee, the Supreme Court of the State of New York, Held, J., sua sponte, vacated the stipulation on the ground that the option agreement was invalid for lack of an essential term, to wit, the price to be paid upon the exercise of the option, and dismissed the action (23a). This dismissal was affirmed by the Appellate Division, Second Department (11a).

A motion for leave to appeal to the Court of Appeals was denied on June 30, 1989 (27a). The Respondent raised a furor in the local press, radio and national television, that Mr. Hollander, who had been convicted of grand larceny and medicaid fraud, was now attempting to place five hundred elderly residents of a nursing home onto the pavement of the City of New York. Numerous elected officials, including Governor Mario Cuomo, entered the foray which created headlines in the local press. Governor Cuomo stated in substance that he would never allow the nursing home patients to be evicted and that he would keep the case tied up in court forever.

A motion for leave to reargue the denial of leave to appeal to the Court of Appeals was made by the Respondent, COBBLE HILL NURSING HOME, INC., and in a rare if not unprecedented decision in a Civil case, the Court of Appeals reversed its original decision and granted leave to appeal.

The Court of Appeals reversed the decision of the Appellate Division and granted specific performance to the Respondent, COBBLE HILL NURSING HOME, INC. and in

doing so it did not give any consideration to the stipulation of the parties, although the Supreme Court had vacated this stipulation sua sponte; nor did the Court of Appeals return the matter to the court of original jurisdiction to determine the glaring factual issues presented by the parties.

THE COURT OF APPEALS OF THE STATE OF NEW YORK DENIED THE PETITIONER DUE PROCESS UNDER THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION BY GRANTING JUDGMENT TO THE RESPONDENT, COBBLE HILL NURSING HOME, INC., WHEN IT FAILED TO PROVIDE THE PETITIONER A HEARING TO PRESENT WITNESSES AND DOCUMENTARY EVIDENCE TO DETERMINE THE NUMEROUS FACTUAL ISSUES SURROUNDING THE FORMATION OF THE CONTRACT AND THE INTENT OF THE PARTIES TO THE PRICE, ESPECIALLY WHEN THE PARTIES STIPULATED THAT A HEARING WAS TO BE HELD

The Fourteenth Amendment to the United States Constitution provides in part that ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S.C.A. Const. Amend. 14, Sec. 1. The Fourteenth Amendment requires at a minimum that the deprivation of life, liberty or property be preceded by an opportunity for a hearing appropriate to the nature of the case. *Mullane v. Central Hanover Bank & Trust Co., et al.,* 339 U.S. 306, 70 S.Ct. 652, 656-657 (1950); *Mary Poe and Harold R. Hoke, M.D. v. Charlotte Memorial Hospital, Inc., et al.,* 374 F.Supp. 1302 (1974). The instant case involves the deprivation of property, namely, the nursing home owned by the Petitioner, THE HENRY AND WARREN CORPORATION. The United States Supreme Court has consistently held that prior to the deprivation of an individual's property right, some form of a hearing is required. *Mathews, Secretary of Health, Education and Welfare v. Eldridge,* 429 U.S. 319, 96 S.Ct. 893, 902, 47 L.Ed.2d 18 (1976). This principle is basic to the American Society, even though it may not involve the hardship or stigma of a criminal conviction,

Id. at 902; *Joint Anti-Fascist Refugee Committee v. McGrath,* 341 U.S. 123, 71 S.Ct. 624, 646, 95 L.Ed. 817 (1951). Due Process is a flexible concept and as such requires "such procedural protections as the particular situation demands." *Holbrook v. Pitt v. Secretary, United States Department of Housing and Urban Development,* 643 F.2d 1261, 1280 (7th Cir. 1981); *Morrisey v. Brewer,* 408 U.S. 471, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484; *Greenholtz v. Inmates of Nebraska Penal & Correctional Complex,* 442 U.S. 1, 99 S.Ct. 2100, 2106, 60 L.Ed.2d 668 (1979).

The petitioner was not afforded his constitutional right to due process by the New York State Court of Appeals. The Petitioner was never given the opportunity to present evidence on numerous factual issues which were essential to his case. *Joint Anti-Fascist Refugee Committee, Id.* at 644; *Mathews v. Eldridge,* 96 S.Ct. at 903; *Mary Poe,* 374 F.Supp. at 1310-1311. To begin with, the Petitioner was never given the opportunity to present evidence as to the fact that it was never his intent that the option price would be his cost less the rent received; that the option price was contrary to prevailing market practice and unheard of in the business community. Petitioner also had numerous witnesses which it wished to present to the Court which would have proven unequivocally that it had never been the intention of the parties to compute the purchase price in the manner utilized by the Commissioner. *Mary Poe,* 374 F. Supp. at 1310-1311.

Furthermore, the Petitioner was deprived of the opportunity to present evidence as to the impossibility of his having agreed to use Rule 10 NYCRR Sec. 86-2.21e (46a) as the basis for the price in the option agreement. Had the Court of Appeals remanded this matter for a hearing, Petitioner would have presented evidence that Rule 10 NYCRR Sec. 86-2.21e was not enacted until October 1986, almost six months after the parties entered into the subject option agreement. It was inconceivable that the Petitioner had assented to the use of this above rule, as it is impossible to assent to something not yet in existence.

The Court imposed its own conception of what the parties should or might have undertaken by awarding judgment based upon a determination under 10 NYCRR Sec. 86-2.21e. *Joseph Martin, Jr., Delicatessen, Inc. v. Henry D. Schumacher,* 52

NY2d 541, 436 N.Y.S.2d 247, 249 (Court of Appeals, 1981). The parties could not have mutually agreed to base a price upon something which was not yet in existence, and mutual assent is a pre-requisite to the granting of specific performance. *Caisson Corporation v. Ingersoll-Rand Company,* 622 F.2d 672 (3rd Cir. 1980). The mutual assent of the parties is necessary, as if "the court is left to ascertain the intention of the parties by mere guess or conjecture . . . it might be guilty of erroneously decreeing what the parties never intended or contemplated". *Homart Development Co. v. W.T. Sigman,* 868 F.2d 1556, 1558 (11th Cir. 1989).

Moreover, Petitioner was not able to present evidence as to the Commissioner's lack of authority to fix the purchase price according to 10 NYCRR Sec. 86-2.21e. This provision is only a basis for rental reimbursement based on capital cost, and is not a basis upon which to fix the purchase price of property. The Public Health Law of the State of New York is devoid of any provision upon which to base the purchase price of property.

Furthermore, the Court of Appeals failed to give any consideration to the stipulation entered into between the parties whereby it was expressly agreed that all matters financial and the methodology of arriving at the price would be reserved for this Court (49a). Thus, the parties most certainly could not have intended for the Commissioner to fix the purchase price according to 10 NYCRR Sec. 86-2.21e. In doing so, the Commissioner acted in both an arbitrary and capricious manner, ignoring the intent of the parties involved.

The New York Court of Appeals made findings of fact despite the prohibition against making such findings contained in the New York State Constitution, Article 6, Sec. 3a. (58a).

It made the finding that the Petitioner intended the price to be cost less reimbursement. It also found that Mr. Hollander, the principal of the Petitioner, was required to surrender ownership and that his objective was to avoid incarceration. Evidence would have proven otherwise.

The most egregious finding of fact by the Court of Appeals was that the Petitioner intended to convey property valued at $20,000,000.00 for $3,046,442.00. This is tantamount to a forfeiture, which Courts of Equity abhor. *In the Matters of*

Walter J. Kassuba et al., Debtors, Walter J. Kassuba, Intercontinental Development Co., Inc., and Transam Development Corporation v. Realty Income Trust, 562 F.2d 511, 514 (7th Cir. 1977). The penal statutes under which Petitioner plead did not contain a provision for forfeiture. The judgment of the Court of Appeals thus effectuates a forfeiture without statutory authority. Indeed, in upholding the Commissioner's price determination, the Court of Appeals was not able to cite any authority for doing so, but merely stated "that the Department could indeed calculate a price by reference to its rules and regulations is evidenced by the fact that it did exactly that." *Cobble Hill Nursing Home, Inc. v. The Henry and Warren Corporation and David Axelrod, & Co.,* No. 237-opn (1989) (8a). This reasoning totally fails in logic since he could just as well determine the price by looking at the position of the stars in the sky. Before adopting a standard for determining the option price it was first necessary that the parties mutually agreed to the standard. This would have been impossible for the respondents to prove since the standard adopted by the court did not exist. This price determination results in a windfall to the tenant since subtracting all monies received in rent from the construction cost to establish the purchase price results in the tenant's rent free occupancy of the premises for ten years.

In conclusion, "the fundamental requisite of due process of law is the opportunity to be heard", and Petitioner was denied this right. *Mullane v. Central Hanover Bank & Trust Co. et al.,* 70 S.Ct. 652, 657 (1950).

THE COURT OF APPEALS OF THE STATE OF NEW YORK DENIED THE PETITIONER DUE PROCESS UNDER THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION BY GRANTING JUDGMENT TO THE RESPONDENT, COBBLE HILL NURSING HOME, INC., WHEN IT FAILED TO PROVIDE THE PETITIONER A HEARING TO DETERMINE WHETHER A COURT OF EQUITY SHOULD GRANT SPECIFIC PERFORMANCE, WHERE BY VIRTUE OF THE OPINION OF THE COURT OF APPEALS THE PETITIONER WAS PRECLUDED FROM PRESENTING EVIDENCE THAT SPECIFIC PERFORMANCE WAS AN INEQUITABLE AND INAPPROPRIATE REMEDY UNDER THE CIRCUMSTANCES

The Due Process clause of the Fourteenth Amendment requires at a minimum that the deprivation of life, liberty or property be preceded by an opportunity for a hearing appropriate to the nature of the case. *Mullane v. Central Hanover Bank & Trust Co., et al.,* 339 U.S. 306, 70 S.Ct. 652, 656-657 (1950). The Court of Appeals of the State of New York granted specific performance to the respondent, COBBLE HILL NURSING HOME, INC., on a motion for summary judgment. This relief was granted without the Petitioner being given the opportunity for a hearing. Before the remedy of specific performance can be granted, the court must hold an evidentiary hearing to determine any and all factual questions regarding the subject agreement. *United States v. Johnson,* 861 F.2d 510, 513 (8th Cir. 1988).

Specific performance is an equitable remedy, and as such general principles of equity jurisprudence must be followed in its use. *El Paso Natural Gas Company v. Western Building Associates,* 675 F.2d 1135, 1142 (10th Cir. 1982); *In re Sunset Memorial Gardens, Inc., Memorial Associates, Inc. v. Sunset Memorial Gardens, Inc.,* 49 B.R. 817, 822 (Bkrtcy. 1985). It is not an absolute right, *Id.* at 822. "Equity in its true and genuine meaning is the soul and spirit of all law, and positive law is con-

strued by it and rational law is made by it." In this, equity is synonymous with justice. Equity depends essentially upon the particular circumstances of each individual case. . . . The nature of equity is to amplify, enlarge, and add to the letter of the law and every particular case stands upon its own circumstances." *Aetna Casualty and Supply Company v. Jeppesen & Company,* 440 F.Supp. 394, 403 (1977), quoting Story's Equity Jurisprudence Vol. I, Ch.1. A court of equity must scrutinize all the facts relevant to its decision. The reasonableness of a covenant must be determined from "the nature and position of the parties and from the entirety of their dealings with each other" and not from the language which comprises it. *Associated Spring Corp. v. Roy F. Wilson & Avnet,* 410 F.Supp. 967, 977 (1976). The Court of Appeals based its award of specific performance merely on the language contained in the contract between the parties, contravening all of the established principles of equity. The petitioner was never given the opportunity to present evidence to the court and thus the Court of Appeals was not able to scrutinize the prior dealings between the parties, or their relative positions.

In the instant case, a plenary hearing was needed to determine the facts and circumstances surrounding the subject agreement between the parties. It is these circumstances and conditions that define one's right to specific performance. *Keller v. California Liquid Gas Corporation,* 363 F.Supp. 123, 128 (1973). The lack of this hearing was a grave miscarriage of justice to the Petitioner, as specific performance will not be granted to a proponent who is found to be guilty of any inequitable advantage. *United States v. Georgia-Pacific Company,* 421 F.2d 92, 104 (9th Cir. 1970). Indeed, the United States Supreme Court has long held that specific performance will not be granted by a court of equity where the result would be unconscionable, unjust or inequitable. *Union Pac. Ry. Co. et al. v. Chicago, R.I. & P.R.Y. Co.,* 163 U.S. 654, 16 S.Ct. 1173, 1189 (1896). Whether or not an agreement is unconscionable is tested as of when the agreement is made, and the relevant considerations are: "Whether 1) the protesting party was deprived of meaningful choice as to whether to enter into the contract; 2) the party was compelled to accept the terms; 3) there was an opportunity for meaningful negotiations; and 4) there was gross

inequality of bargaining power." *Kerr-McGee Corporation v. Northern Utilities, Inc.*, 673 F.2d 323, 329 (10th Cir. 1982).

The circumstances surrounding the agreement between the Petitioner and the Respondent, COBBLE HILL NURSING HOME, INC., are extremely relevant to the consideration of whether or not this agreement is unconscionable. This agreement was entered into the day before Mr. Hollander, the principal of the Petitioner, was scheduled to be sentenced in Federal court. Mr. Hollander was compelled to sign this agreement under the threat of incarceration, and against the advice of his attorney. There was no opportunity for meaningful negotiation, nor did Mr. Hollander have any choice but to sign the agreement, due to his impending sentencing looming over him. There was most certainly inequality of bargaining power under the circumstances. Thus, the test of unconscionability as set forth in *Kerr-McGee* would certainly have been met, had the Petitioner been afforded a hearing, as is required before granting specific performance. *Sunset Memorial Gardens,* 49 B.R. at 822.

Prior to granting specific performance it is imperative that the court first "balance the equities," and the following factors must be considered: "a) the threat of irreparable harm to the movant; b) the balance between this harm and the harm that would result to the defendants from granting the injunction; and c) the public interest." *Sunset Memorial Gardens,* 49 B.R. at 882. In the instant case, the Petitioner will be irreparably harmed should he be compelled to specifically perform the subject agreement according to the directive of the New York State Court of Appeals. The value of the property involved is more than four times the price fixed by the Commissioner of the State of New York Department of Health. The Petitioner was entitled to a hearing on how this price was calculated, as well as an opportunity to prove how he will be irreparably harmed by the onerous price which was fixed. Furthermore, the Respondent, COBBLE HILL NURSING HOME, INC., will not be irreparably harmed should specific performance not be granted, as it has the remedy of damages. The Respondent, COBBLE HILL NURSING HOME, INC., had the burden to allege and prove that the remedy of damages was inadequate, and the court had a duty to ascertain whether the Respondent could

have been adequately compensated by monetary damages. *Sunset Memorial Gardens,* 49 B.R. at 822. Neither of these two obligations were fulfilled, and the Court of Appeals thus granted the equitable remedy of specific performance in an inequitable manner. Prior to granting the specific performance of a contract, a court must ascertain that there is a definite and specific agreement as to the terms of a contract. *Homart Development Co., v. W.T. Sigman,* 868 F.2d 1556, 1558 (11th Cir. 1989). It is vital that the minds of both parties meet on the essential terms of the contract, and that the parties assent to the same thing in the same sense. *Caisson Corporation v. Ingersoll-Rand Company,* 622 F.2d 672 (3rd Cir. 1980). The terms of the contract must be certain so that neither party can reasonably misunderstand them. *Homart Development Co.,* 868 F.2d at 1558. The Court of Appeals decreed its award of specific performance by enforcing a term of the agreement upon which the minds of the parties had not mutually agreed.

The Petitioner was denied the opportunity to show that the subject agreement was inadequate, inequitable, unconscionable, and that a "balance of the equities" would certainly have weighed in the Petitioner's favor.

Respectfully submitted,

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APPENDIX A

STATE OF NEW YORK
COURT OF APPEALS

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2 No. 237

Cobble Hill Nursing Home, Inc.,
Appellant,

v.

The Henry and Warren Corporation,
Respondent,

David Axelrod, &c.,
Intervenor.

OPINION

This opinion is uncorrected and subject to revision before publication in the New York Reports.

Louis A. Craco, NY City, for appellant.

Joseph Frost, NY City, for respondent.

Robert Abrams, Attorney General (R. Scott Greathead, O. Peter Sherwood, Lawrence S. Kahn, Christopher K. Hall of counsel) for intervenor.

KAYE, J.:

The legal question at the core of this human drama is whether an option permitting plaintiff to purchase a nursing home is so indefinite in its price term as to preclude enforcement by the courts. Contrary to the trial court and the Appellate Division, we conclude that the price term is sufficiently definite, and therefore grant judgment to plaintiff requiring specific performance of the contract.

The agreement at issue arose in connection with the nursing home scandals of the 1970's. Eugene Hollender, then a prominent figure in the industry, had for years been the operator of several nursing homes, until his felony convictions in 1976. He

was and remains president of defendant Henry & Warren Corporation, owner of the Brooklyn property plaintiff seeks to purchase; his wife was and remains the corporation's sole shareholder. Prior to his convictions Hollander and his wife leased this property from defendant corporation, and operated the Congress Nursing Home there.

In July 1975 Hollander was indicted by state and federal grand juries for crimes involving unwarranted health and medical care reimbursements. Faced with possible loss of operating certificates and preclusion from the nursing home business, Hollander during plea negotiations asked that the Department of Health appoint receivers who would continue to operate his nursing homes and pay rent to Henry & Warren Corporation.* Negotiations ensued for the appointment of plaintiff—a not-for-profit hospital corporation organized by community residents—as receiver for the Congress Nursing Home. Hollander's efforts at similar arrangements for his other nursing homes proved fruitless, as did his litigation to compel appointment of receivers for those facilities.

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*Hollander's request was made pursuant to Public Health Law §2810(1), which provides:

> The owner or owners of any residential health care facility may at any time request the department to take over the operation of such facility by the appointment of a receiver. Upon receiving such a request, the department may, if it deems such action desirable, enter into an agreement with any such owners on the appointment of a receiver to take charge of the facility under whatever conditions as shall be found acceptable by both parties. Receivership commenced in accordance with the provisions of this subdivision shall terminate at such time as is agreed upon by the parties, or at such time as either party notifies the other in writing that he wishes to terminate such receivership.

Talks regarding plaintiff's receivership continued through year-end. At a meeting in December, the Department informed Hollander that the maximum rent payable by a receiver would be calculated pursuant to the Medicaid reimbursement regulations (10 NYCRR Part 86), which provided for reimbursement based upon a facility's historical cost. Thus calculated, projected rent for Congress was approximately half the amount defendant was then receiving. The Department refused to reconsider the matter, and indeed advised Hollander that it would take steps to revoke his operating certificates if a receiver was not soon installed.

In May 1976 Hollander entered a plea to the federal charges and was sentenced to a five-year term of imprisonment (which was suspended), fined $10,000 and placed on probation for five years; a condition of his probation was that he "divest himself of all connections, direct or indirect, with any occupation that requires the custody or care of other people." Hollander had earlier pleaded guilty in State Supreme Court to the felonies of grand larceny in the second degree and offering a false instrument for filing in the first degree, but sentencing on the state charges was postponed because of the ongoing negotiations involving the transfer to plaintiff.

On May 17, 1976, a Receivership Agreement was signed by plaintiff, defendant, the Hollanders and the Department. On that same date, plaintiff and defendant additionally entered into a lease for the premises, assuring defendant continuing income from the operation of the nursing home, with rent to be "determined * * * by [the Department of Health] pursuant to all applicable statutes, rules and regulations." Both the Receivership Agreement and the lease—each incorporating the other—contain the following purchase option:

> During the Term of the Lease, [plaintiff] shall have an option to purchase the premises (including without limitation the improvements thereon and the items set forth on the Inventory) at any time during said Term at a price determined by the Department in accordance with the Public Health Law and all applicable rules and regulations of the Department without prejudice to the remedies, if any, of the parties herein.

The very day after these agreements were signed—May 18, 1976—Hollander was sentenced to five years' probation conditioned on payment of a fine of $250,000 and $1,000,000 restitution to the State, as well as permanent divestiture of all his nursing home interests. The Receivership Agreement and lease enabled Hollander to represent to the sentencing court that he was completely out of the nursing home business.

More than three years later, in Fall 1979, plaintiff notified the Department that it elected to exercise its option, and asked the Department to set the price. The Department in turn supplied "a computation of the Medicaid allowable transfer price which is the Initial Price as called for by the Receiver Agreement." As the Department explained:

> The Medicaid allowable transfer price (as well as Medicaid reimbursement for capital cost) is based upon the original historical cost of the facility as reported to the Department, subject to Departmental review. The original historical cost of the facility is also called the initial allowed facility cost and is defined in 10 NYCRR 86-2.21(a)(6). This cost serves as the basis for a capital cost component in the Medicaid reimbursement rate determined pursuant to NYCRR 86-2.21(e).

The Department determined that as of January 1, 1980, the Initial Price defined in the purchase option provisions of the agreements was $3,046,352.

Plaintiff exercised the option, and delivered its down payment. Defendant, however, refused stating that it had "no intention of selling the facility in question to Cobble Hill at a price to be established by the Department in accordance with the Public Health Law as it is presently constituted." Defendant objected that the transfer price established by those provisions was "confiscatory", in that it bore "no relation to market value or any other reasonable criteria of true value for this facility." Defendant filed suit in the United States District Court for the Eastern District of New York, alleging due process violations and unjust taking. Those charges were dismissed for failure to state a claim, and the pendent state law claims were dismissed for want of jurisdiction.

Plaintiff meanwhile commenced an action in the State Supreme Court for specific performance of the option; defendant counterclaimed for rescission or adjustment of rent payments to fair market value. Defendant also separately sued the Department and the Commissioner of Health (intervenor on this appeal) challenging the determinations of rent and price as less than fair value. Both state court actions were consolidated into the present suit.

In response to plaintiff's motion for summary judgment, the parties entered into a stipulation. By agreement, Supreme Court awarded plaintiff partial summary judgment and struck defendant's affirmative defenses and the counterclaims except for "financial matters," which were reserved for the Court. If the parties could not themselves reach an amicable resolution by June 16, 1986, they were to return to court for a hearing on those matters. In December 1986, at a hearing on the open financial matters, Supreme Court *sua sponte* vacated the stipulation and proceeded to hear argument on the validity of the option. Defendant at that point contended that the option was void for indefiniteness of the price term, in that no provision of the Public Health Law or the Department's rules and regulations provide a method for fixing the sales price of real property.

Supreme Court dismissed the complaint, finding that the option agreement was unenforceable for failure to specify a method by which price could be determined, and a divided Appellate Division affirmed. The court concluded that the specified law and regulations did not provide an explicit mechanism for determining purchase price, and that the parties had therefore failed to state an essential term, rendering the option unenforceable. The dissenting Justice, by contrast, found an enforceable contract, because the option expressed the parties' intent that the price be fixed by a third party, or because the agreement set forth a practicable method by which price was to be determined, or because the question was foreclosed by the parties' stipulation for partial summary judgment (144 AD2d 518, 524-527).

After dismissal for nonfinality of a motion for leave to appeal to this Court, Supreme Court granted defendant's application to direct plaintiff to surrender possession of the nursing home—at the time housing more than 500 elderly residents—and denied a cross motion for a stay. We then granted leave to appeal as well as a stay, and now reverse.

Few principles are better settled in the law of contracts than the requirement of definiteness. If an agreement is not reasonably certain in its material terms, there can be no legally enforceable contract (*Martin Delicatessen v. Schumacher,* 52 NY2d 105, 109, *supra;* Restatement [Second] of Contracts §33 [1981]). The doctrine of definiteness serves two related purposes.

First, unless a court can determine what the agreement is, it cannot know whether the contract has been breached, and it cannot fashion a proper remedy (*see, Metro-Goldwyn-Mayer Inc. v. Scheider,* 40 NY2d 1069, 1070-1071; Restatement [Second] of Contracts §33[2] [1981]). This is particularly significant where specific performance is sought (*Martin Delicatessen,* 52 NY2d at 110, *supra*). *Second,* the requirement of definiteness assures that courts will not impose contractual obligations when the parties did not intend to conclude a binding agreement (*see,* Restatement [Second] §33[3] [1981]).

While the settled principles are easily articulated, their proper application has sometimes proved elusive. The difficulty is that the concept of definiteness cannot be reduced to a precise, universal measurement (J. Calamari & J. Perillo, Contracts §2-9, at 53 [3d ed]). The standard is necessarily flexible, varying for example with the subject of the agreement, its complexity, the purpose for which the contract was made, the circumstances under which it was made, and the relation of the parties (*id* at 54; E. Farnsworth, Contracts §§ 3.27, 3.29 [1982]).

Moreover, at some point virtually every agreement can be said to have a degree of indefiniteness, and if the doctrine is applied with a heavy hand i efeat the reasonable expectations of the parties in entering into the contract (*see, Cohen & Sons v. Lurie Woolen Co.,* 232 NY 112, 114 [Cardozo, J.]; J. Murray, Contracts §27, at 47 [2d ed. 1974]). While there must be a manifestation of mutual assent to essential terms, parties

also should be held to their promises and courts should not be "pedantic or meticulous" in interpreting contract expressions (1 A. Corbin, Contracts §95, at 396 [1963]; *see also,* UCC 2-204[3]). Before rejecting an agreement as indefinite, a court must be satisfied that the agreement cannot be rendered reasonably certain by reference to an extrinsic standard that makes its meaning clear (*Martin Delicatessen,* 52 NY2d at 110, *supra;* 1 S. Williston, Contracts §47, at 153-156 [1957]). The conclusion that a party's promise should be ignored as meaningless "is at best a last resort." (*Cohen & Sons v. Lurie Woolen Co.,* 232 NY at 114, *supra.*)

Passing from the general to the particular, a price term is not necessarily indefinite because the agreement fails to specify a dollar figure, or leaves fixing the amount for the future, or contains no computational formula. Where at the time of agreement the parties have manifested their intent to be bound, a price term may be sufficiently definite if the amount can be determined objectively without the need for new expressions by the parties; a method for reducing uncertainty to certainty might, for example, be found within the agreement or ascertained by reference to an extrinsic event, commercial practice or trade usage (*Martin Delicatessen, supra,* at 110; *Metro-Goldwyn-Meyer v. Scheider,* 40 NY2d 1069, 1070-1071, *supra;* Anno., *Requisite Definiteness of Price to Be Paid in Event of Exercise of Option for Purchase of Property,* 2 ALR3d 701). A price "so arrived at would have been the end product of agreement between the parties themselves." (*Martin Delicatessen, supra,* at 110.)

That standard is met here. Applying the foregoing principles to the facts, we conclude that the price term was sufficiently definite for an enforceable contract.

Addressing first the language of the agreement, the option manifests the parties' unmistakable intent that price was to be fixed by a third person—the Department of Health—itself providing an objective standard without the need for further expressions by the parties (*compare, Martin Delicatessen, supra; see also,* UCC 2-305[1][c]; 1 A. Corbin, *op. cit.* §98, at 435-436; E. Farnsworth, *op. cit.* §3.28, at 198; Knapp, *Enforcing the Contract to Bargain,* 44 NYUL Rev 573, 696 [1969]). That the

agreement additionally directed the Department to fix the price "in accordance with the Public Health Law and all applicable rules and regulations" does not render the term indefinite.

Defendant urges that there is in fact no "applicable" rule or regulation for fixing the sales price of real property and tehrefore the essential term is illusory. But it is apparent from the agreement that these parties reposed discretion in the Department to make the price determination, limited only by the requirement that it apply provisions that were suitable, pertinent and appropriate for the task at hand. As the dissenting Justice below correctly observed, while the regulations did not authorize the Department to set a purchase price they did provide a means of fixing one—which is all these parties required. "The Public Health Law contemplates 'Medicaid' reimbursement to nursing home operators for 'real property costs' (*see,* Public Health Law §2808), including reasonable rent (*see,* 10 NYCRR 86-2.21[c]) and, where the operator is the owner, the reasonable costs of acquisition, e.g. amortization, interest and 10 NYCRR 86-2.21[c]) and, where the operator is the owner, the reasonable costs of acquisition, e.g. amortization, interest and 'return of equity' (*see,* 10 NYCRR 86-2.21[e])." (144 AD2d at 525.)

That the Department could indeed calculate a price by reference to its rules and regulations is evidenced by the fact that it did exactly that. As reflected in its letter fixing the price, the Department followed its regulations by referring to historical cost, then reducing that figure by the amount paid by the Medicaid program as capital cost reimbursement as of January, 1980, and announcing the option price.

Beyond the contract language, the undisputed circumstances in which this agreement was made further confirm that the Department was to have the authority it exercised in fixing the price.

This was hardly an ordinary contract concluded between two private parties. Hollander's overriding objective was to avoid incarceration for his crimes; only the binding agreement he had reached with plaintiff literally on the eve of sentencing permitted him to make the representations to the court

necessary to attain that objective. The Department's interest was to ensure the continuing operation of the nursing home, on a financial basis that would attract a responsible operator yet meet the cost-containment standards set by law for this largely publicly funded program.

The agreements repeatedly refer to plaintiff's limited resources and inability to pay more than reimbursable amounts. The Receivership Agreement states that plaintiff is a not-for-profit corporation having minimum capital, that plaintiff may not receive any fee as a receiver, and that "[n]otwithstanding anything to the contrary contained herein or in the Lease, the liability of [plaintiff] for rent, additional rent or other liaility due to the Landlord or the Operator hereunder shall be limited to amounts finally determined by the Department or other applicable authority to be reimbursable under the Medicaid program." Likewise, the lease reflects the parties' recognition that plaintiff expects that "the primary source of its revenues" from the operation of the nursing home would be Medicaid payments and that this expectation was "a substantial and material inducement" to enter into the lease.

In these circumstances, when the parties designated the Department to fix the option price, that designation was obviously not for the purpose of calculating the nursing home's market value (*see,* E. Farnsworth, *op. cit.* §3.28, at 198 n 20 [noting the risks of third-party valuation]). Defendant's contention that, under this agreement, it is somehow entitled to the equivalent of fair market value is simply without substance.

Bearing in mind the two objectives served by the definiteness requirement in contract law, there is no legal justification for voiding this agreement. The terms of agreement and the appropriate remedy can be readily determined, and it is plain that the parties intended this to be a complete and binding contract. Far from being a necessary "last resort," to declare this defendant's promise legally meaningless—thus allowing it to walk away with its property after enjoying the benefits of the bargain—defeats the reasonable expectations of the parties in entering into the contract and is a misuse of the definiteness doctrine.

Given an enforceable agreement that permitted the Department of Health to fix the option price as it did, and given defendant's refusal to comply, there can be no question that defendant has breached the contract. Where, as here, the agreement is for the conveyance of real property, specific performance rather than damages is the appropriate remedy (*see, Van Wagner Adv. Corp. v. S&M Enters.*, 67 NY2d 186, 192).

Accordingly, the order of the Appellate Division should be reversed, with costs, and judgment granted in plaintiff's favor.

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Order reversed with costs, and judgment granted in favor of plaintiff. Opinion by Judge Kaye. Chief Judge Wachtler and Judges Simons, Alexander, Titone, Hancock and Bellacosa concur.

December November 21, 1989

APPENDIX B

144 A.D.2d 518

COBBLE HILI NURSING HOME, INC., Appellant,

v.

The HENRY AND WARREN CORPORATION, Respondent. (Action No. 1)

HENRY AND WARREN CORPORATION, Plaintiff,

v.

David AXELROD, etc., Defendant. (Action No. 2)

Supreme Court, Appellate Division, Second Department.

Nov. 21, 1988.

Lessee of nursing home sought to enforce option provision contained in lease. The Supreme Court, Kings County, Held, J., dismissed the complaint finding provision unenforceable, after having previously granted motion in favor of plaintiff for partial summary judgment. On appeal, the Supreme Court, Appellate Division, held that: (1) intermediate order was dismissed because it was entered upon stipulation and subsequently vacated and superseded, and (2) option provision in lease was unenforceable for lack of price.

Dismissed and affirmed.

Harwood, J., concurred in part and dissented in part with opinion.

1. Appeal and Error 784

Appeal from intermediate order which was entered upon a stipulation and subsequently vacated and superseded by judgment must be dismissed.

2. Vendor and Purchaser 1

Generally, in contract for sale of realty, essential terms which must be included are parties, price and subject matter.

3. Evidence 400(2)

Parol evidence may not be used to add an essential term to a contract for sale of realty.

4. Landlord and Tenant 92(1)

Option clause for sale of nursing home in lease was unenforceable for a lack of price; option stated that home would be sold for prices determined by State Department of Health under specified regulations, but those regulations specified did not contain any mechanism for price determination but dealt with unrelated subject matter.

McGuire & Tiernan, New York City (Harold F. McGuire, Jr., and Arthur V. Nealon, of counsel), for appellant.

Robert Abrams, Atty. Gen., New York City (Randolph Volkell, of counsel), for defendant in Action No. 2.

Rappaport & Frost, Brooklyn (Firestone & Harris [Alan J. Firestone, Joseph Frost and George Meissner], of counsel), for respondent.

Before MANGANO, J.P., and BRACKEN, EIBER and HARWOOD, JJ.

MEMORANDUM BY THE COURT.

In consolidated actions, *inter alia,* for specific performance of an option agreement to sell real property, the plaintiff Cobble Hill Nursing Home, Inc., appeals from an order of the Supreme Court, Kings County (Held, J.), dated February 11, 1986, which, upon a stipulation, granted the motion of the plaintiff in Action No. 1 for partial summary judgment, and from a judgment of the same court (Held, J.), dated January 20, 1987, which, *inter alia,* dismissed the complaint in Action No. 1.

ORDERED that the appeal from the order is dismissed; and it is further,

ORDERED that the judgment is affirmed; and it is further,

ORDERED that the respondent is awarded one bill of costs.

[1] The appeal from the intermediate order must be dismissed because it was entered upon a stipulation and was subsequently vacated and superseded by the judgment.

[2,3] The plaintiff instituted Action No. 1 to compel the defendant to perform an alleged option agreement to sell a nursing home. It is well settled that in order for a contract for the sale of property to be enforceable, "it must be sufficiently certain and specific so that what was promised can be ascertained" (*Martin Delicatessen v. Schumacher,* 52 N.Y.2d 105, 109, 436 N.Y.S.2d 247, 417 N.E.2d 541). Generally, in a contract for the sale of realty, the essential terms that must be contained in a memorandum are the parties, the subject matter and the price (*see, Birnhak v. Vaccaro,* 47 A.D.2d 915, 367 N.Y.S.2d 792; 56 NY Jur, Statute of Frauds §197). Parol evidence may not be used to add an essential term (*Matter of Levin,* 302 N.Y. 535, 99 N.E.2d 877; *Keystone Hardware Corp. v. Tague,* 246 N.Y. 79, 158 N.E. 27 [1927]; *see also,* 4 Williston, Contracts §567A, at 16; 56 NY Jur, Statute of Frauds, §197). However, "[a]n agreement is not unenforceable for lack of definiteness of price if the parties specify a practicable method by which the price can be determined by the court without any new expressions by the parties themselves" (*Matter of McManus,* 83 A.D.2d 553, 554, 440 N.Y.S.2d 954; 1 Corbin, Contracts §§97-98; *cf., Sanitary Farm Dairies v. Gammel,* 8th Cir., 195 F.2d 106).

[4] The instant agreement provided that [d]uring the term of the lease "tenant thereunder *** shall have an option to purchase the premises *** at any time during said term at a price determined by the [New York State] Department [of Health] in accordance with the Public Health Law and all applicable rules and regulations of the Department". An examination of the Public Health Law, and the applicable rules and regulations of the New York State Department of Health fails to reveal any mechanism or procedure by which the New York State Department of Health could determine the purchase price for the subject realty. The provisions relied on by the dissent, *i.e.,* Public Health Law §2808(2-a)(d) and 10 NYCRR 86-2.-21(a)(6) and (e), do not compel a different conclusion. These provisions merely provide for the establishment of a Medicaid reimbursement rate to the operator of a nursing home, and are not relevant with respect to the purchase price of a nursing home. Since a material element was omitted from the parties' agreement, no

valid contract ever came into existence (*see, Martin Delicatessen v. Schumacher, supra; Cosmolite Mfg. Co. v. Theodus,* 122 A.D.2d 246, 505 N.Y.S.2d 172). Under the circumstances, the Supreme Court properly vacated, *sua sponte,* the stipulation entered into by the defendant in Action No. 1 granting the plaintiff's motion for partial summary judgment, and correctly held that the purchase option was unenforceable (*see, Martin Delicatessen v. Schumacher, supra; Cosmolite Mfg. Co. v. Theodus, supra).*

MANGANO, J.P., and BRACKEN and EIBER, JJ., concur.

HARWOOD, Justice, concurs insofar as the appeal from the order is dismissed, but dissents and votes to reverse the judgment appealed from, reinstate the order, and remit the matter to the Supreme Court, Kings County, for further proceedings in accordance herewith, with the following memorandum:

It is my opinion that the Supreme Court improperly vacated a stipulation by which the parties limited the issues to be judicially resolved. It is also my opinion that the Supreme Court erroneously ruled that an option provision contained in a receivership agreement and lease is unenforceable. I therefore dissent and vote to reverse the judgment dated January 20, 1987, and would remit the matter to Supreme Court for determination of the financial issues left unresolved by the parties' on-the-record stipulation.

The defendant The Henry and Warren Corporation is the owner of premises located in Brooklyn, New York on which its principal, Eugene Hollender, once operated one of several nursing homes. In 1975, Hollander was indicted in both Federal and State courts for crimes stemming from his abuses of the Medicare and Midicaid programs. As he conducted plea negotiations with Federal and State prosecutors, Hollander requested, pursuant to Public Health Law §2810(1) that the New York State Department of Health (hereinafter the Department) appoint receivers to operate his nursing homes. Pursuant to that request, the Department and Hollander entered into negotiations for the appointment of the plaintiff, a not-for-profit corporation, as receiver of the nursing home operated on the

Brooklyn premises. Receiverships for other nursing homes were also discussed, but the Department ultimately declined to appoint receivers for Hollander's other homes, apparently because, unlike the nursing home on the Brooklyn premises, there was no public need for their continued existence.

On May 4, 1976, Hollander was sentenced by the United States District Court for the Eastern District of New York (Weinstein, J.), upon a plea of guilty, to five years' probation conditioned upon his divestiture of all interests, direct and indirect, in enterprises connected with the care of other people. A $10,000 fine was also imposed. On May 18, 1976, Hollander was sentenced by the New York State Supreme Court, Kings County (Mollen, J.), upon his plea of guilty, to five years' probation conditioned on his divestiture of all nursing home interests. He was also fined $250,000 and ordered to make restitution of $1,000,000.

On May 17, 1976, two weeks after imposition of the Federal sentence and one day before imposition of the State sentence, Hollander, individually and on behalf of the defendant corporation, entered into a receivership agreement with the plaintiff and the Department concerning the nursing home operated on the Brooklyn premises. Hollander, on behalf of the defendant corporation and the plaintiff simultaneously executed a five-year lease whereby the plaintiff agreed to pay the defendant corporation, for the use of the premises as a nursing home, annual rent in an "amount to be determined *** by [the Department] pursuant to all applicable statutes, rules and regulations". Both the receivership agreement and the lease, each of which incorporates the other by reference, afford the plaintiff an option, exercisable at any time during the five year term of the lease, to purchase the premises "at a price determined by the Department in accordance with the Public Health Law and all applicable rules and regulations of the Department." The manner of payment of the Department-determined purchase price is set forth in detail in the lease and receivership agreement. Moreover, the portion of the receivership agreement governing "Lease and Option to Purchase" provides that "[n]otwithstanding anything to the contrary contained herein or in the Lease, the liability of the [plaintiff] for rent *** or

other liability due to the [defendant corporation] or [Hollaner] shall be limited to amounts finally to be determined by the Department *** to be reimbursable underthe Medicaid program". In January 1977 Hollander sought to protect a claimed $10,000,000 investment in two other nursing homes by unsuccessfully suing the Department on account of its refusal to enter into receivership agreements with respect to those nursing homes, which agreements incorporated leases and options to purchase virtually identical to those upon which this litigation is premised.

In October 1979 the plaintiff timely exercised the option to purchase the Brooklyn premises in accordance with the receivership agreement and lease. In November 1979 the Department fixed the purchase price of the premises at $3,046,352 and, in its notice to the plaintiff and the defendant corporation, set forth in detail its computations in arriving at what it termed the "Medicaid allowable transfer price." Its computation was based on the original "historical" or "initial allowed facility" cost (*see,* Public Health Law §2808[2-a][d]; 10 NYCRR 86-2.21[a][6], which cost was the basis for the "capital cost component" in the Medicaid real property reimbursement rate determined pursuant to 10 NYCRR 86-2.21(e), less capital cost payments already made pursuant to the Medicaid reimbursement program. In December 1979 the defendant corporation advised that it had no intention of selling the Brooklyn premises at a "price to be established" by the Department because it regarded as "confiscatory" the "system" whereby price was in effect limited to historical cost less depreciation. In June 1980 the plaintiff commenced an action for specific performance of the option to purchase (Action No. 1). In July 1981 after unsuccessfully seeking to have the United States District Court for the Eastern District of New York declare the option provision void as an unlawful taking (*see, Henry & Warren Corp. v. Whalen,* US Dist Ct, EDNY, Bramwell, J., May 11, 1981), the defendant corporation interposed its answer in this litigation. Although it asserted various affirmative defenses, the Statute of Frauds was not among them. It did, however, affirmatively assert that the price set by the Department was not determined in accordance with the Public Health Law. In its counterclaims, the defendant

corporation sought declarations that the option clause is unenforceable because the Public Health Law contains no provision authorizing the Department to set purchase prices for nursing homes, that the lease pursuant to which the plaintiff has occupied the premises since 1976 is void because there are no statutes, rules, or regulations governing "rent", and that it is entitled to the fair rental value of the premises for the period from 1976. It also sought money judgments for sums claimed to be due pursuant to an escrow agreement and for sums allegedly due pursuant to the receivership agreement for supplies left at the premises. The defendant corporation also commenced a separate action (Action No. 2) against the Commissioner of the Department seeking declarations that the Department must fix rent and purchase price in amounts not less than the fair rental and fair market values. That action was subsequently consolidated with Action No. 1.

In 1985, the plaintiff sought summary judgment dismissing the defendant corporation's affirmative defenses and counterclaims and directing that it convey title in accordance with the receivership agreement and lease. The defendant corporation's terse opposition to the motion consisted of its attorney's assertion that more disclosure was needed as to the method of fixing price. However, on the motion's final submission date of February 11, 1986, counsel for the plaintiff, the defendant corporation and the Commissioner appeared before Supreme Court, Kings County, and placed on the record a stipulation by which it was agreed that the plaintiff's motion for summary judgment should be granted "except [that] all items financial in nature are reserved for [the] court. Said items of financial nature are referred to a conference between the Department *** and *** defendant [Corporation] to resolve. If said items are not resolved, the items of financial nature are reserved for determination by [the] court". Through that stipulation, the parties specified that the issue "is the prior recommended purchase price of the property and the methodology used to determine said price by the Department *** [o]ther items at issue are all financial items set forth in the counterclaims of the defendant [Corporation]". According to

the stipulation, "[i]n the event an agreement is not reached [with regard to all financial matters] the parties shall appear before the court in order to commence a hearing on all issues financial in nature". The parties additionally specified that "[a]ll other issues of law have been resolved by the granting of this motion for summary judgment [that] the only issues left to be resolved as to all parties are financial matters [and that] the granting of this motion for summary judgment constitutes resolution of all matters at law with regard to this case". In the order appealed from dated February 11, 1986, the Supreme Court granted the plaintiff partial summary judgment in accordance with the "stip[ulation] on record".

The parties could not agree on the "financial" matters apparently because of a Department error as to "historical cost". The parties thus appeared for the hearing contemplated by the stipulation. During the course of opening remarks, the Supreme Court interrupted the plaintiff's counsel to assert that, since the making of the stipulation, it had learned that the defendant corporation alleged there were no regulations governing the fixation by the Department of "price", notwithstanding that counsel made clear that the same regulations and methodology used to determine "price" were used to determine "rent". The Supreme Court then *sua sponte* vacated the stipulation and proceeded to hear oral argument as to whether the option was enforceable. Finding there was an "ambiguity", but refusing the plaintiff the opportunity to prove that the parties intended "price" would be fixed by the Department in accordance with the rate at which a nursing home operator would be reimbursed for acquisition costs as set forth in the Medicaid regulations, the court held that "the contract" was "void for vagueness". By judgment dated January 20, 1987, the Supreme Court dismissed the complaint, presumably pursuant to CPLR 3212(b), and severed and continued the defendant corporation's counterclaims and the "action" against the defendant Commissioner.

I agree with the majority that the plaintiff's appeal from the order dated February 11, 1986, granting it partial summary judgment in accordance with the on-the-record stipulation must

be dismissed. The plaintiff, like the other parties which consented to the order, is not aggrieved by it (*cf.*, CPLR 5511). However, I cannot agree that the judgment should stand.

In holding the option clause unenforceable, the majority relies on the well-established but general rule that, in order to be binding, a contract must set forth all essential terms, including either the price or "a practicable method by which the price can be determined by the court without any new expressions by the parties themselves" (*Matter of McManus*, 83 A.D.2d 553, 554, 440 N.Y.S.2d 954). In so doing, the majority overlooks the fact that the option provision is not a mere agreement to agree. It calls for no new expression of intent by the parties to the transaction but rather expresses their intent that price be fixed by a third party. I am aware of no statutory or judicial rule of law which prohibits parties from contractually agreeing that price shall be fixed by others (*cf.*, CPLR 7601; *Matter of Penn Cent. Corp.*, 56 N.Y.2d 120, 451 N.Y.S.2d 62, 436 N.E.2d 512), even where the sale of realty is involved (*see, Matter of N.Y., L. & W. R.R. Co.*, 98 N.Y. 447). And assuming that parties who contractually elect to have price determined by another are nonetheless required to set forth a formula by which the designated third party is to fix price (*but cf.*, CPLR 7601; *Matter of N.Y., L. & W. R.R. Co., supra*), the plaintiff and the defendant corporation have, by contract, set forth a "practicable method" by which the designated third party—the Department—was to determine price, i.e. by reference to the Public Health Law and the regulations promulgated pursuant to it.

It is true, as the Supreme Court and the defendant corporation observed, that the Public Health Law and the regulations do not specifically authorize the Department to fix the "purchase prices" of nursing homes any more than they authorize the Department to fix the rent an operator must pay to an owner for use of premises on which a nursing home is operated. But apart from the fact that such authority has here been conferred on the Department by contract (*see, Henry & Warren Corp. v. Whalen*, US Dist Ct, EDNY, May 11, 1981, Bramwell, J., *supra*), I cannot agree with the majority that there is no "procedure" by which the Department can determine the "option price". The Public Health Law contemplates "Medicaid" reim-

bursement to nursing home operators for "real property costs" (*see,* Public Health Law §2808), including reasonable rent (*see,* 10 NYCRR 86-2.21[c]) and, where the operator is the owner, the reasonable costs of acquisition, e.g. amortization, interest and "return of equity" (*see,* 10 NYCRR 86-2.21[e]). The fact that one of the bases for computing reimbursement amounts for real property costs is "historical cost" as defined in the regulations, the fact that additional complicated criteria are involved, and the fact that the reimbursement amount arrived at may not equal fair rental or fair market value do not support the majority's implicit conclusion that no criteria exist (*see, Hurlbut v. Axelrod,* 101 A.D.2d 999, 477 N.Y.S. 2d 74; *Matter of Schwartzberg v. Axelrod,* 100 A.D.2d 694, 474 N.Y.S.2d 645). The regulatory criteria for establishing reimbursement amounts for amortization, interest and return of equity provide the Department with a practicable method for determining price and, in my view, the parties, by the option provision, expressed their intent that it use that method for doing so (*cf., Martin Delicatessen v. Schumacher,* 52 N.Y.2d 105, 111, 436 N.Y.S.2d 247, 417 N.E.2d 541).

Any doubts as to whether the defendant corporation, by contract, afforded the plaintiff an option to purchase the Brooklyn premises at a price which conformed with the acquisition costs the plaintiff could recoup pursuant to Public Health Law §2808 and 10 NYCRR 86-2.21 are rendered irrelevant by the stipulation pursuant to which the plaintiff was granted partial summary judgment. "Parties by their stipulations may in many ways make the law for any legal proceeding to which they are parties, which not only binds them, but which the courts are bound to enforce *** [a]ll such stipulations not unreasonable, not against good morals or sound public policy, have been and will be enforced" (*Matter of N. Y., L. & W. R.R. Co., supra,* 98 N.Y. at 453; *see also, Salesian Soc. v. Village of Ellenville,* 41 N.Y.2d 521, 393 N.Y.S.2d 972, 362 N.E.2d 604; *Nishman v. DeMarco,* 76 A.D.2d 360, 430 N.Y.S.2d 339, *affd.* 62 N.Y.2d 926, 479 N.Y.S.2d 185, 468 N.E.2d 23). Moreover, a stipulation between counsel which is spread on the record is as binding as a written contract (*cf.,* CPLR 2104). Only where there is cause such as fraud, collusion or mutual mistake which is sufficient to

vacate a formal contract will a party be relieved of the consequences of a stipulation made during the course of litigation (*see, Hallock v. State of New York,* 64 N.Y.2d 224, 230, 485 N.Y.S.2d 510, 474 N.E.2d 1178).

There is no claim by the defendant corporation, and no hint in the record, that the February 11, 1986 stipulation was the product of fraud, collusion or mutual mistake. I can discern no legal or public policy considerations which justify a failure to enforce a stipulation by which the parties effectively limited the issues that the Supreme Court, and this court on appeal, can determine (*see, Salesian Soc. v. Village of Ellenville, supra; Nishman v. DeMarco, supra*). And although the financial questions of whether the Department accurately determined price in accordance with criteria set forth in its own regulations, whether the plaitniff owes the defendant corporation sums pursuant to a tangential escrow agreement, and whether the plaintiff owes the defendant corporation sums for supplies the latter left at the Brooklyn premises are to be judicially resolved, the stipulation makes clear that issues of law, e.g. the enforceability of the purchase option, are no longer open to question, either by the parties or by the courts.

The majority concludes that Supreme Court properly vacated, *sua sponte,* the stipulation dated February 11, 1986. Its apparent rationale is that since, in its view, an essential element is missing from the underlying receivership agreement and lease, we need not heed a subsequent contract. However, "[c]ourts have long favored the fashioning of stipulations by opposing counsel as effective and enforceable means for expediting trials by permitting them to focus on controverted issues" (*Salesian Soc. v. Village of Ellenville, supra,* 41 N.Y.2d at 525-526, 393 N.Y.S.2d 972, 362 N.E.2d 604). It is my view that we cannot ignore a stipulation by which the parties charted their own procedural course (*see, Salesian Soc. v. Village of Ellenville, supra*) and coincidentally reasserted their intent that the Department fix price in accordance with the objective Medicaid reimbursement standard (*see, Martin Delicatessen v. Schumacher, supra,* 52 N.Y.2d at 110, 436 N.Y.S.2d 247, 417 N.E.2d 541). It is also my view that we are bound by principles of contract law, reasonableness and sound public policy to enforce it (*see, Matter of N.Y., L. & W. R.R. Co.,* 98 N.Y. 447, *supra*).

Whether execution of the receivership agreement, lease and option to purchase satisfy the divestiture requirements on which Hollander's apparently concurrent and now-expired sentences of probation were conditioned is beyond the scope of this appeal. It is evident, however, that the lease and option to purchase which the defendant corporation, and through it, Hollander, now seeks to avoid are conditions which made the receivership requested by Hollander acceptable to the plaintiff and the Department (*see,* Public Health Law §2810[1]). And although the lease and option provisions apparently work to deprive Hollander of the opportunity of pocketing fair rental and fair market amounts, the agreement "package" nonetheless affords the defendant corporation and, through it, Hollander, some return on their "investment", in apparent contrast to investments in nursing homes which the Department declined, over Hollander's objection, to salvage. By ignoring the February 11, 1986 stipulation, by ruling unenforceable the option provision of the receivership agreement and lease, and by dismissal of the complaint, the defendant corporation and, through it Hollander, are now also afforded the opportunity, albeit delayed, of reaping from a "fair market" sale of the premises profits which both State and Federal authorities determined that Hollander was not entitled to enjoy when they directed him to divest himself of his nursing home interests. By severance and continuation of the defendant corporation's counterclaims and its claim against the Commissioner, the defendant corporation and, through it, Hollander, are afforded the opportunity of litigating whether the plaintiff is liable for fair rental and fair market value, notwithstanding that, by contract, plaintiff's "liability *** for rent *** or other liability *** shall be limited to amounts finally *** determined by the Department *** to be reimbursable under the Medicaid program". In my view, the judgment appealed from is contrary to established principles of contract law and sound public policy. I therefore vote to reverse it.

APPENDIX C

At an IAS Part 6 of the Supreme Court of the State of New York, County of Kings, 360 Adams St., Brooklyn, New York on the 20 day of January, 1987.

P R E S E N T
HON. GERALD S. HELD
Justice

COBBLE HILL NURSING HOME, INC.,
Plaintiff,

-against-

THE HENRY AND WARREN CORPORATION,
Defendant.

HENRY AND WARREN CORPORATION,
Plaintiff,

-against-

DAVID AXELROD, M.D., COMMISSIONER OF THE STATE OF NEW YORK DEPARTMENT OF HEALTH,
Defendant.

Index No. 14493/80

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

The issues in the above entitled action having duly come on to be heard before the Hon. Gerald S. Held, Justice of this Court, without a jury, at an IAS Part 6 of this Court, held at the Courthouse thereof located at 360 Adams Street, Brooklyn, New York on the 16th day of December 1986, and the plaintiff, COBBLE HILL NURSING HOME, INC., having appeared by its attorneys, Cullen and Dykman, Esqs., by Cynthia Boyer Okrent, Esq., and the defendant THE HENRY AND WARREN CORPORATION, having appeared by its attorneys, Rap-

paport & Frost, by Joseph Frost, Esq., and the defendant DAVID AXELROD, M.D., COMMISSIONER OF THE STATE OF NEW YORK DEPARTMENT OF HEALTH, having appeared by Robert Abrams, Attorney General of the State of New York by Randolph Volkell, Esq., and Joseph P. Perretta, Esq., and the plaintiff in Action No. 1, COBBLE HILL NURSING HOME, INC., having made an opening statement and having moved for summary judgment and the Court having heard argument on said motion, and after due deliberation having rendered a decision on the record on December 16, 1986, denying said motion for summary judgment and directing entry of judgment dismissing plaintiff's causes of action in Action No. 1, the Court makes the following Findings of Fact, Conclusions of Law and Judgment:

FINDINGS OF FACT

1. The purported agreement entered into by COBBLE HILL NURSING HOME, INC. and the defendant THE HENRY AND WARREN CORPORATION, and THE NEW YORK STATE DEPARTMENT OF HEALTH, dated May 17, 1976, provides in paragraph 9.02 that during the term of the lease the tenant thereunder shall have an option to purchase the premises at any time during said term at a price determined by the Department in accordance with the Public Health Laws, and all applicable rules and regulations of the Department, without prejudice or remedies, if any, of the parties herein. . . .

2. The purported agreements fails to provide a price pursuant to which the tenant may exercise its option to purchase the premises and further fails to provide a viable method for determining said price.

CONCLUSIONS OF LAW

1. There is no procedure by which the Department of Health can determine the option purchase price under the agreement in accordance with the Public Health Laws or under the Rules and Regulations of the Department of Health.

2. The agreement is ambiguous, vague and deficient as to price and may not be reformed or resolved by parole evidence.

3. The defendant THE HENRY AND WARREN CORPORATION, is entitled to a judgment dismissing plaintiff's

causes of action set forth in the complaint of the COBBLE HILL NURSING HOME, INC. in Action No. 1.

JUDGMENT

NOW, on motion of RAPPAPORT & FROST, attorneys for THE HENRY AND WARREN CORPORATION, defendant in Action No. 1, and plaintiff in Action No. 2, it is

ORDERED, ADJUDGED AND DECREED that the plaintiff COBBLE HILL causes of action in its complaint is hereby dismissed, and it is further

ORDERED, ADJUDGED AND DECREED that defendant's counterclaims together with its action against DAVID AXELROD, etc., et al, be severed, and that COBBLE HILL NURSING HOME, INC. be named as additional party defendant so as to amend the caption to read as follows:

THE HENRY AND WARREN CORPORATION,
Plaintiff,

-against-

DAVID AXELROD, M.D., COMMISSIONER OF THE STATE OF NEW YORK DEPARTMENT OF HEALTH and COBBLE HILL NURSING HOME, INC.,
Defendants.

---

and it is further

ORDERED, ADJUDGED AND DECREED that the trial of the remaining issues contained in the counterclaims set forth in Action No. 1, together with Action No. 2 will be heard at an IAS Part 6 of this Court on March 30, 1987.

ENTER
s/ Gerald S. Held
J.S.C.

APPENDIX D

2-10 Mo. No. 451

Cobble Hill Nursing Home, Inc.,

Appellant,

v.

The Henry and Warren Corporation,

Respondent.

(Action No. 1)

Henry and Warren Corporation,

Respondent,

v.

David Axelrod, &c.,

Appellant.

(Action No. 2)

Motions for leave to appeal dismissed upon the ground that the order sought to be appealed from does not finally determine the actions within the meaning of the Constitution.

DECISION COURT OF APPEALS JUN 30 1989

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the thirty day of June A.D. 1989

Present, HON. SOL WACHTLER, *Chief Judge, presiding.*

2-10 Mo. No. 451

Cobble Hill Nursing Home, Inc.,

Appellant,

v.

The Henry and Warren Corporation,

Respondent.

(Action No. 1)

Henry and Warren Corporation,

Respondent,

v.

David Axelrod, &c.,

Appellant.

(Action No. 2)

Motions for leave to appeal to the Court of Appeals in the above causes having heretofore been made upon the part of the appellants herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motions be and the same hereby are dismissed upon the ground that the order sought to be appealed from does not finally determine the actions within the meaning of the Constitution.

s/ Donald M. Sheraw
Donald M. Sheraw
Clerk of the Court

APPENDIX E

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND DEPARTMENT

GUY J. MANGANO, J.P.
LAWRENCE J. BRACKEN
GERALDINE T. EIBER
STANLEY HARWOOD, JJ.

Motion No. 729-730

Cobble Hill Nursing Home, Inc., appellant, v The Henry and Warren Corporation, respondent. (Action No. 1)
Henry and Warren Corporation, plaintiff, v Davis Axelrod, etc., defendant.
(Action No. 2)

DECISION & ORDER ON MOTION

Motion by defendant (Action #2) David Axelrod, M.D. Commissioner of the State of New York, Department of Health for leave to appeal to the Court of Appeals from the order of this court dated November 21, 1988, which affirmed a judgment of the Supreme Court, Kings County, dated January 20, 1987.

Cross motion by plaintiff (Action #1) for leave to appeal to the Court of Appeals from the same order of this court.

Upon the papers filed in support of the motion and cross motion and the papers filed in opposition thereto, it is

ORDERED that the motion and cross motion are denied.

ENTER:
MARTIN H. BROWNSTEIN
Clerk

February 21, 1989
COBBLE HILL NURSING HOME, INC. v. HENRY & WARREN CORP.

APPENDIX F

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

COBBLE HILL NURSING HOME, INC.,
Plaintiff,

against

THE HENRY AND WARREN CORPORATION,
Defendant.

Plaintiff designates Kings County as the place of trial
The basis of the venue is Plaintiff's Residence
SUMMONS
Plaintiff resides at 380 Henry Street, Brooklyn, New York, County of Kings

To the above named Defendant THE HENRY AND WARREN CORPORATION

YOU ARE HEREBY SUMMONED to answer the complaint in this action and to serve a copy of your answer, or, if the complaint is not served with the summons, to serve a notice of appearance, on the Plaintiff's Attorney(s) within 20 days after the service of this summons, exclusive of the day of service (or within 30 days after the service is complete if this summons is not personally delivered to you within the State of New York); and in case of your failure to appear or answer, jdugment will be taken against you by default for the relief demanded in the complaint.

Dated, Brooklyn, New York
June 6, 1980
Defendant's address:
THE HENRY AND WARREN CORPORATION
c/o E. Hollander
980 Fifth Avenue
New York, New York 10021

CULLEN AND DYKMAN
Attorneys for Plaintiff
COBBLE HILL NURSING HOME, INC.
177 Montague Street
Brooklyn, New York 11201

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

COBBLE HILL NURSING HOME, INC.,
Plaintiff,

-against-

THE HENRY AND WARREN CORPORATION,
Defendant.

VERIFIED COMPLAINT

Plaintiff, COBBLE HILL NURSING HOME, INC., by its attorneys, CULLEN AND DYKMAN, as and for its verified complaint herein, alleges:

1. At all times hereinafter mentioned, plaintiff was and still is a domestic Not-For-Profit hospital corporation duly organized and existing under and by virtue of the laws of the State of New York with its principal office at Henry and Pacific Streets, Brooklyn, New York.

2. Upon information and belief, at all times hereinafter mentioned, defendant, THE HENRY AND WARREN CORPORATION, was and still is a domestic corporation duly organized and existing under and by virtue of the laws of the State of New York with its principal office at c/o E. Hollander, 980 Fifth Avenue, New York, New York.

AS AND FOR A FIRST CAUSE OF ACTION

3. On or about May 17, 1976, plaintiff and defenant, THE HENRY AND WARREN CORPORATION and New York State Department of Health, entered into a written agreement whereby plaintiff as Receiver agreed to operate a certain nursing home located at premises 380 Henry Street. A copy of said

Receivership Agreement is annexed hereto as Exhibit "A".

4. On or about May 17, 1976, plaintiff and defendant, THE HENRY AND WARREN CORPORATION, entered into a written lease for premises 380 Henry Street for a term of five years commencing May 17, 1976. A copy of said lease is annexed hereto as Exhibit "B".

5. Pursuant to Article 33 of the aforementioned lease, defendant, THE HENRY AND WARREN CORPORATION, granted to plaintiff an option to purchase the subject premises.

6. The manner in which plaintiff was to exercise said option was to be governed by §9.02 of the aforementioned Receivership Agreement.

7. On or about October 15, 1979, pursuant to the aforementioned Receivership Agreement, plaintiff's counsel advised defendant, THE HENRY AND WARREN CORPORATION and New York State Department of Health, that plaintiff desired to exercise the purchase option it held on the premises and requested that the New York State Department of Health issue a Notice of the Purchase Price for the premises. A copy of plaintiff's counsel's letter is annexed hereto as Exhibit "C".

8. By letter dated November 26, 1979 the New York State Department of Health notified plaintiff's counsel that the "Initial" Price for the premises was $3,046,352. A copy of said "Initial" Price letter is annexed hereto as Exhibit "D".

9. Said "Initial" Price letter did not state whether it was the final price to be set for the premises nor did it state the date as of which the price was effective nor the date by which plaintiff was to notify defendant and the Department that it would accept or reject the price.

10. By letter dated November 30, 1979 plaintiff's counsel advised the Department of Health that the "Initial" notice did not meet the requirements of Article 9.02 of the Receivership Agreement. A copy of said letter is annexed hereto as Exhibit "E".

11. As a result, on November 30, 1979 plaintiff formally notified the Department of Health of its election to exercise the option and requested the Department of Health to issue a Price Notice for the premises. A copy of said notice is annexed hereto as Exhibit "F".

12. By Price Notice dated January 24, 1980, the Department of Health in accordance with the Public Health Law and its rules and regulations and in accordance with the provisions of the Receivership Agreement and Lease determined the purchase price for the premises to be $3,046,352.00 to be reduced monthly by $2,186.00 commencing February 1, 1980 until the end of 1980. A copy of said Price Notice is annexed hereto as Exhibit "G".

13. Pursuant to paragraph 33(i) of said Lease, the option agreement became a contract for sale of the subject premises immediately upon the exercise of the option by COBBLE HILL.

14. Pursuant to paragraph 33(a) of the Lease, COBBLE HILL was to set the date and hour for closing of title, which date was to be within ninety (90) days of defendant's receipt of COBBLE HILL's down payment.

15. Pursuant to Section 9.02(i) of the Receivership Agreement, and paragraph 33(a) of the Lease, the purchase option was not exercised until COBBLE HILL notified defendant of its acceptance of the purchase price set forth in the price notice and in accordance with Section 9.02(i) of the Receivership Agreement delivered to defendant within forty (40) days of the Price Notice dated January 24, 1980, as down payment, an amount equal to ten (10%) percent of the excess, if any, of the price set forth in said Price Notice over the then outstanding principal amount of any mortgage liens on the premises.

16. Upon information and belief, mortgage liens on the premises amounted to approximately $176,578.00 as of January 1, 1980.

17. By letter dated February 14, 1980, COBBLE HILL exercised the purchase option by delivering to defendant a bank check in the amount of $286,758.71 representing the aforementioned down payment on the premises and setting May 6, 1980 for closing of title. A copy of said letter is annexed hereto as Exhibit "H".

18. On April 30, 1980, prior to the date set for closing of title, defendant notified COBBLE HILL that it refused to proceed with the closing unless a new purchase agreement was negotiated. A copy of said letter is annexed hereto as Exhibit "I".

19. By virtue of its conduct as aforesaid, the defendant has breached its contract for sale of the premises to COBBLE HILL.

20. Plaintiff, COBBLE HILL, is entitled to specific performance of said contract including conveyance of the premises to its by defendant at the price set by the New York Department of Health in its price notice dated January 24, 1980 together with the costs of this action.

21. COBBLE HILL, has no adequate remedy at law and stands in jeopardy of losing the benefit of its contract with defendants if the subject property is not conveyed to it at the price determined by the New York State Department of Health in accordance with the Receivership Agreement and Lease.

AS AND FOR A SECOND CAUSE OF ACTION

22. Plaintiff, COBBLE HILL, repeats, reiterates and realleges each and every allegation contained in paragraphs "1" through "21" with the same force and effect as if set forth fully herein.

23. On December 20, 1979, prior to the issuance of the Price Notice by the Department of Health, defendant notified plaintiff, COBBLE HILL, that under no circumstances would HENRY AND WARREN CORPORATION sell the premises to plaintiff. A copy of said letter is annexed hereto as Exhibit "J".

24. By virtue of said conduct, defendant breached its agreement with COBBLE HILL.

25. As a result of said breach, COBBLE HILL is entitled to specific performance of said agreement, including conveyance to it by defendant of the premises at the price set by the New York State Department of Health in its Price Notice dated January 24, 1980.

AS AND FOR A THIRD CAUSE OF ACTION AGAINST DEFENDANT THE HENRY AND WARREN CORPORATION.

26. Plaintiff, COBBLE HILL, repeats, reiterates and realleges each and every allegation contained in paragraphs "1" through "25' with the same force and effect as if set forth fully herein.

27. By virtue of defendant's breach of the contract for the sale of the premises, COBBLE HILL has been damaged in the sum of $15,000,000.00.

WHEREFORE, plaintiff demands judgment that

1. Defendant, THE HENRY AND WARREN CORPORATION be ordered and decreed specifically to perform the option or agreement contained in the aforesaid Receivership Agreement and Lease;

2. Defendant, THE HENRY AND WARREN CORPORATION be ordered and decreed to execute and deliver to plaintiff a deed conveying to plaintiff in fee simple the premises hereinbefore described;

3. In the alternative, plaintiff have judgment for the sum of $15,000,000.00 plus interest;

4. Plaintiff have such other and further relief as to the Court seems just and proper, together with the costs and disbursements of this action.

CULLEN AND DYKMAN
Attorneys for Plaintiff
Cobble Hill Nursing Home, Inc.
Office and P.O. Address
177 Montague Street
Brooklyn, New York 11201
(212) 855-9000

APPENDIX G

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

COBBLE HILL NURSING HOME, INC.,
Plaintiff,

-against-

THE HENRY AND WARREN CORPORATION,
Defendant.

VERIFIED AMENDED ANSWER
Index No. 14493/80

Defendant, HENRY AND WARREN CORPORATION, as and for its verified answer to the verified complaint, by its attorney, MARVIN L. TENZER, respectfully alleges as follows:

1. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "1".

2. Denies each and every allegation contained in paragraph "2", except admits that defendant was and still is a domestic corporation duly organized and existing under and by virtue of the laws of the State of New York with its principal office at 29 John Street, New York, New York.

3. Denies each and every allegation contained in paragraphs "3", "4", "5", "6", and respectfully refers the Court to the Receivership Agreement and the lease for the provisions thereof.

4. Denies each and every allegation contained in paragraph "7", except admits that on or about October 15, 1979, plaintiff's counsel advised defendant and the New York State Department of Health (the "Department of Health") that plaintiff elected to exercise the purchase option provided in the Receivership Agreement, and respectfully refers the Court to the October 15, 1979 letter for the contents thereof.

5. Denies each and every allegation contained in paragraphs "8" and "9", except admits that by letter dated November 26, 1979 the Department of Health notified plaintiff's counsel that the price for Cobble Hill Nursing Home pursuant to paragraph 9.02 of the Receivership Agreement was $3,046,352 as of January 1, 1980, and respectfully refers the Court to the November 26, 1979 letter for the contents thereof.

6. Denies each and every allegation contained in paragraphs "10" and "11" and respectfully refers the Court to the November 30, 1979 letters for the contents thereof.

7. Denies each and every allegation contained in paragraph "12", and respectfully refers the Court to the January 24, 1980 letter for the contents thereof.

8. Denies each and every allegation contained in paragraphs "13", "14" and "15", and respectfully refers the Court to the Receivership Agreement and the lease for the provisions thereof.

9. Denies each and every allegation contained in paragraph "17" and respectfully refers the Court to the February 14, 1980 letter for the contents thereof.

10. Denies each and every allegation contained in paragraph "18", except admits that by letter dated April 28, 1980 defendant's counsel notified plaintiff's counsel that plaintiff's purchase option under the Receivership Agreement had expired, advised plaintiff's counsel that defendant was ready, willing and able to negotiate a purchase agreement for the Premises, and respectfully refers the Court to the April 28, 1980 letter for the contents thereof.

11. Denies each and every allegation contained in paragraphs "19", "20" and "21".

12. Paragraph "22" contains no allegations not previously answered.

13. Denies each and every allegation contained in paragraph "23", except admits that by letter dated December 20, 1979 defendant's counsel notified the Department of Health and plaintiff's counsel that the purchase option had been vitiated as a result of plaintiff's defaults under the lease and respectfully refers the Court to the December 20, 1979 letter for the contents thereof.

14. Denies each and every allegation contained in paragraphs "24" and "25".

15. Paragraph "26" contains no allegations not previously answered.

16. Denies each and every allegation contained in paragraph "27".

AS AND FOR A FIRST AFFIRMATIVE DEFENSE

17. The complaint fails to state a cause of action.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE

18. The Receivership Agreement and the lease should be rescinded and/or declared null and void because they were executed by defendant HENRY AND WARREN CORPORATION solely as a result of duress and undue influence.

AS AND FOR A THIRD AFFIRMATIVE DEFENSE

19. No provisions of the Public Health Law nor of the rules and regulations of the Department of Health set purchase prices for residential health care facilities.

20. By reason of the foregoing, a condition precedent to defendant's obligation to sell the Premises to plaintiff has not been satisfied, and defendant has no obligation to sell the Premises to Plaintiff.

AS AND FOR A FOURTH AFFIRMATIVE DEFENSE

21. Defendant repeats and realleges each and every allegation contained in paragraph 19 herein as though fully set forth at length.

22. In the absence of any provisions of the Public Health Law or of the rules and regulations of the Department of Health relating or referring to the setting of purchase prices for residential health care facilities, there is an implied condition precedent to defendant's obligation to sell the Premises to plaintiff that the purchase price for the Premises be an amount not less than its fair market value.

23. The purchase price set by the Department of Health is substantially less than the fair market value of the Premises.

24. By reason of the foregoing, a condition precedent to defendant's obligation to sell the Premises to plaintiff has not

been satisfied, and defendant has no obligation to sell the Premises to plaintiff.

AS AND FOR A FIFTH AFFIRMATIVE DEFENSE AND A FIRST COUNTERCLAIM AGAINST PLAINTIFF

25. On or about May 17, 1976, plaintiff, defendant and the Department of Health entered into a written agreement (the "Receivership Agreement") whereby plaintiff as receiver agreed to operate a certain nursing home (the "Facility") located at the Premises at 380 Henry Street, Brooklyn, New York.

26. Paragraph 9.02 of the Receivership Agreement provides for the Department of Health to set a purchase price for the Premises in accordance with the Public Health Law and all applicable rules and regulations of the Department of Health.

27. No provisions of the Public Health Law nor of the rules and regulations of the Department of Health set purchase prices for residential health care facilities.

28. By reason of the foregoing, the provisions of the Receivership Agreement providing for an option to purchase the Premises are null and void.

29. By reason of the foregoing, defendant is not obligated to sell the Premises to plaintiff.

AS AND FOR A SIXTH AFFIRMATIVE DEFENSE AND A SECOND COUNTERCLAIM AGAINST PLAINTIFF

30. Defendant repeats and realleges each and every allegation contained in paragraphs 25 through 27 herein as though fully set forth at length.

31. In the event that plaintiff does have an enforceable option to purchase the Premises which has been properly exercised, the purchase price for the Premises must be an amount not less than the fair market value of the Premises.

AS AND FOR A THIRD COUNTERCLAIM AGAINST PLAINTIFF

32. On or about May 17, 1976, plaintiff and defendant entered into a written Indenture of Lease for the Premises at 380 Henry Street, Brooklyn, New York for a term of five years commencing on May 17, 1976.

33. Thereafter an escrow arrangement was established with respect to the rental payments to be made to defendant, as the

landlord under the Indenture of Lease. Pursuant to the escrow arrangement the rental payments were to be held by plaintiff, as escrow agent, subject to further disposition by court order.

34. Upon information and belief, the rental payments held by plaintiff as escrow agent pursuant to the escrow arrangement were deposited in an interest-bearing savings account.

35. On or about June 29, 1979, an Order was entered in the Clerk's Office of the Supreme Court, County of Kings, Criminal Term, Part I, directing that plaintiff pay $225,000 out of the escrow funds to the Clerk of the Supreme Court, County of Kings, and thereafter immediately pay to defendant the entire balance, if any, remaining in the escrow account.

36. On or about July 9, 1979, defendant received a check from plaintiff in the amount of $221,989.70.

37. Upon information and belief, plaintiff has not paid defendant any of the interest which accrued on the escrow funds while the funds were on deposit in the savings account.

38. Upon information and belief, in excess of $40,000 in interest accrued on the escrow funds while they were on deposit in the savings account.

39. To date, plaintiff has wrongfully refused to account for the interest which accrued on the escrow funds and to pay defendant said amount.

40. By reason of the foregoing, defendant has been damaged in an amount in excess of $40,000.00, plus interest thereon.

AS AND FOR A FOURTH COUNTERCLAIM AGAINST PLAINTIFF

41. Defendant repeats and realleges each and every allegation contained in paragraph 25 herein as though fully set forth at length.

42. Paragraph 5.11 of the Receivership Agreement provides that plaintiff shall purchase from defendant the food supplies, medical supplies, kitchen ware and all other consumable supplies located at the Facility on the date of the Receivership Agreement. Payment for such supplies was to be made within sixty (60) days after the date of the Receivership Agreement.

43. In or about May, 1976, defendant submitted to plaintiff a list of the supplies which were left at the Facility on the date of

the Receivership Agreement and presented plaintiff with a bill for such supplies in the amount of $95,900.17.

44. Thereafter, plaintiff only paid defendant the sum of $83,013.83 for the foregoing supplies.

45. To date, plaintiff has failed to pay to defendant the unpaid balance of $12,886.34 due and owing for the supplies.

46. By reason of the foregoing, defendant has been damaged in the amount of $12,886.34, plus interest thereon.

AS AND FOR A FIFTH COUNTERCLAIM AGAINST PLAINTIFF

47. Defendant repeats and realleges each and every allegation contained in paragraph 32 herein as though fully set forth at length.

48. Article 2(a)(1) of the Indenture of Lease, provides that plaintiff shall pay to defendant an annual rent for plaintiff's use of the Premises in an amount set by the Department of Health pursuant to all applicable statutes, rules and regulations.

49. There are no applicable statutes, rules and regulations setting the amount of rent to be paid for the use of residential health care facilities.

50. By reason of the foregoing, Article 2(a)(1) of the Indenture of Lease is null and void.

51. From May 17, 1976 to the present plaintiff has occupied and had exclusive use of the Premises.

52. Defendant is entitled to receive the fair rental for plaintiff's use of the Premises.

WHEREFORE, defendant, HENRY AND WARREN CORPORATION, prays that judgment be entered in its favor:

(a) dismissing the Complaint;

(b) directing plaintiff to account for the interest which accrued on the rental payments held by plaintiff as escrow agent and awarding defendant said interest, plus interest thereon;

(c) awarding defendant $12,886.34, the unpaid balance due and owing to defendant for supplies left at the Facility, plus interest thereon;

(d) declaring and adjudging that no provisions of the Public Health Law nor of the rules and regulations of the Department of Health set purchase prices for residential health care facilities;

(e) declaring and adjudging that no provisions of the applicable statutes, rules or regulations set rents to be paid for the use of residential health care facilities;

(f) declaring and adjudging that the provisions of the Receivership Agreement affording plaintiff an option to purchase the Premises are null and void;

(g) declaring and adjudging that the purchase price for the Premises must be set at an amount not less than the fair market value of the Premises;

(h) declaring and adjudging that defendant is entitled to receive a fair rental from plaintiff for its use of the Premises;

(i) declaring and adjudging the amount of the fair monthly rental which defendant is entitled to receive for plaintiff's use of the Premises;

(j) awarding defendant the difference between the amount which it was paid by plaintiff for the use of the Premises and the fair monthly rental for the use of the Premises for the entire period during which plaintiff has occupied the Premises;

(k) awarding defendant reasonable costs and disbursements; and

(l) granting defendant such other further and different relief as may be just and proper.

Dated: New York, New York
September 25, 1981

Yours, etc.

MARVIN L. TENZER
Attorney for Defendant
Suite 2201
39 Broadway
New York, New York 10006
(212) 425-0700

TO:
CULLEN AND DYKMAN
Attorneys for Plaintiff
177 Montague Street
Brooklyn, New York 11201
(212) 855-9000

STATE OF NEW YORK)
COUNTY OF NEW YORK) : ss.:

EUGENE HOLLANDER, being duly sworn, says:

That he is President of Henry and Warren Corporation, the defendant in the within entitled action; that he has read the foregoing Amended Answer and knows the contents thereof and that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes them to be true.

Deponent further says that defendant is a domestic corporation; that deponent is an officer thereof and makes this verification from his personal knowledge and supervision of the affairs and business of said corporation.

s/ Eugene Hollander
EUGENE HOLLANDER

Sworn to before me this
25th day of September, 1981

APPENDIX H

Appearances:

CULLEN & DYKMAN, ESQ.
Attorney for Plaintiff-Cobble Hill Nursing Home
177 Montague Street
Brooklyn, New York
BY: CYNTHIA OCRENT, ESQ.

RAPPAPORT & FROST, P.C.
Attorney for Defendant-The Henry and Warren Corp.
225 Broadway
New York, New York
BY: JOSEPH FROST, ESQ.

ROBERT ABRAMS,
Attorney General of the State of New York
Attorney for Defendant-Dr. Axelrod
Two World Trade Center
New York, New York
BY: ROBERT PEARMAN, ESQ.

Theresa A. Magniccari,
Official Court Reporter

THE COURT: This is a motion brought on behalf of the plaintiff to strike the first, second, third and fourth affirmative defenses and counterclaims asserted by the defendant in verified answer of October 22, 1984, and granting summary judgment in favor of the plaintiff against the defendant The Henry and Warren Corporation to specifically perform the contract, to convey good and marketable title in accordance with the terms of an agreement previously entered into.

The aforegoing relief is granted on consent except all items financial in nature are reserved for this court. Said items of financial nature are referred to a conference between the Department of Health and representatives of the defendant Henry and Warren Corporation to resolve. If said items are not

resolved, the items of financial nature are reserved for determination by this court.

At issue is the prior recommended purchase price of the property and the methodology used to determine said price by the Department of Health. Other items at issue are all financial items set forth in the counterclaims of the denfendant Henry and Warren Corporation.

Within twenty days of the date hereof the defendant Henry and Warren Corporation will advise in writing what items that the Department of Health will supply in order for it to make a proper evaluation pursuant to any rules and regulations and case law which were used or should have been used by the Department of Health in determining the purchase price.

Said demand shall be replied to within thirty days from the date received.

The defendant Henry and Warren Corporation by May 1st, 1986, will have evaluated all of the information before it and by that time commence negotiations with the Department of Health with regard to all financial matters.

In the event that an agreement is not reached on or before the 16th day of June, 1986, the parties shall appear before the court in order to commence a hearing on all issues financial in nature.

All other issues of law have been resolved by the granting of this motion for summary judgment and the only issues left to be resolved as to all parties are financial matters.

The granting of this motion for summary judgment constitutes resolution of all matters at law with regard to this case.

Counsel for the plaintiff, you have heard the stipulation?

MS. OCRENT: Yes, I have.

THE COURT: Do you agree that this stipulation shall constitute the order of this court?

MS. OCRENT: Yes, I do.

THE COURT: Counsel for defendant Henry and Warren Corporation, you have heard the stipulation?

MR. FROST: Yes.

THE COURT: Do you agree that the stipulation shall constitute the order of this court?

MR. FROST: I do.

THE COURT: Counsel for David Axelrod, Commissioner of the State of New York Department of Health, have you heard the stipulation?

MR. PEARMAN: Yes.

THE COURT: Do you agree that this stipulation shall constitute the order of this court?

MR. PEARMAN: Yes.

THE COURT: All counsel having agreed that the aforementioned stipulation shall constitute the order of the court, let it be deemed so.

***

I hereby certify tha the foregoing is a true and accurate transcription of the minutes taken during the above-captioned proceeding.

s/ Theresa A. Magriccari

APPENDIX I

Historical Note

Sec. filed Sept. 30, 1976; amds filed Jan. 26, 1977, Feb. 28, 1977; Sept. 28, 1977; Oct. 25, 1976, March 12, 1982 eff. March 12, 1982. Amended (a).

86-2.21 Capital cost reimbursement for proprietary residential health care facilities. (a) Definitions. As used in this section, the following terms shall be defined as follows:

(1) Capital indebtedness. The term capital indebtedness shall mean all debt obligations of a facility that are:

(i) evidenced by a mortgage note or bond and secured by a mortgage on the land, building or nonmovable equipment of a facility or evidenced by a note incurred in accordance with subparagraph (ii) of this paragraph;

(ii) incurred for the purpose of financing the acquisition, construction or renovation of land, building or nonmovable equipment (hereinafter called the "authorized purpose"); and

(iii) found by the commissioner to be reasonable, necessary and in the public interest with respect to the facility in accordance with standards set forth in section 86-2.21(e)(3)(ii) of this Subpart. Refinancing of capital indebtedness shall be recognized only to the extent of the then unpaid balance of the debt being refinanced.

(2) Commissioner. The term commissioner shall mean the Commissioner of Health of the State of New York.

(3) Department. The term department shall mean the Department of Health of the State of New York.

(4) Equity. The term equity shall mean all cash or other assets, net of liabilities, invested by a facility or its operator in land, building and nonmovable equipment, and found by the commissioner to be reasonable, necessary and in the public interest with respect to the facility. Equity shall not include any change in the book value of a facility resulting from revaluation of assets or from the amortization of capital indebtedness resulting from payments made pursuant to subdivision (e), paragraph (3) of this section.

(5) Facility. The term facility shall mean a proprietary

residential health care facility, as the term residential health care facility is defined in article 28 of the Public Health Law and in regulations of the department.

(6) Initial allowed facility cost. The term initial allowed facility cost shall mean the portion of certified costs approved by the commissioner or, in the case of facilities granted operating certificates prior to April 15, 1973, the costs of the facility as verified by audit to the satisfaction of the commissioner or, in the case of facilities not able to comply with either of the foregoing standards, costs imputed pursuant to subdivision (g) of this section, in or prior to the first year of useful facility life attributable to the acquisition of land and the construction, acquisition or renovation of building and nonmovable equipment. The commissioner shall disregard any costs relating to prior transactions involving the facility which he finds were not bona fide or the terms of which are found to be other than fair and reasonable.

(7) Useful facility life. The term useful facility life shall mean a period of 40 years measured from the calendar year in which a facility commences operations as determined by the commissioner.

(8) Rate of return. The term rate of return shall mean the annual rate of return on equity invested, as said rate is determined by the United States Department of Health, Education and Welfare as an element of reasonable cost for purposes of payments to or reimbursement of proprietary providers under title XVIII of the Federal Social Security Act.

(9) Capital improvement. The term capital improvement shall mean any addition to, replacement of, or improvement of a capital item of plant or nonmovable equipment approved by the commissioner as reasonable, necessary and in the public interest.

(10) Capital improvement cost. The term capital improvement cost shall mean the actual expenditure or portion thereof attributable to a capital improvement approved by the commissioner as reasonable, necessary and in the public interest.

(11) Hospital-based residential health care facility. The term hospital-based residential health care facility shall mean a facility holding a certificate of operation as a residential health

care facility which is wholly owned by a hospital as that term is defined in Subpart 86-1 of this Title, and is physically located in a building or buildings, part of which building or buildings are also used for provision of acute care hospital services.

(12) Effective term. The term effective term shall mean the number of years and months required, pursuant to the term of the note or mortgage, to fully amortize the principal of the debt, predicated upon the regular principal payments required by the mortgage or note, but determined without regard to any provision for making the balance all due and payable at a given date or upon a stated event, and without regard to any provision for acceleration of the debt or any original or subsequent agreement for the suspension or moratorium of principal payments.

(b) Subject to subdivision (f) of this section, the reimbursement rate of every facility certified by the commissioner and approved by the State Director of the Budget pursuant to article 28 of the Public Health Law shall, in each year of useful facility life, include a capital cost component determined in accordance with the provisions of subdivision (c), (d) or (e) of this section applicable to the facility in such year.

(c) (1) The provisions of subdivision (e) of this section shall not apply for the term prescribed by paragraph (3) of this subdivision to any facility which, as of the effective date of this section, is located in and operated from leased space pursuant to a lease:

(i) which was entered into and approved for reimbursement prior to March 10, 1975; and

(ii) which the commissioner finds to be bona fide, valid and noncancelable; and

(iii) the payments, or a portion thereof, made pursuant to such lease are found by the commissioner to have been the proper basis for reimbursement of capital cost paid to such facility pursuant to article 28 of the Public Health Law prior to March 10, 1975.

(2) The capital cost component of a facility within the provisions of paragraph (1) of this subdivision shall, for the term prescribed by paragraph (3) of this subdivision, consist of a payment factor sufficient to reimburse the facility for the total payments required under its lease to

the extent approved by the commissioner pursuant to paragraph (1) of this subdivision, and subject to the historical limitations set forth by the commissioner.

(3) Capital cost reimbursement for leased facilities shall be made pursuant to this subdivision for the balance of the lease term (computed without regard to any future extension or option to renew authorized by the lease) remaining as of the effective date of this subdivision. Upon the expiration of such balance of the lease term provided in an approved lease (as said lease so provides as of August 1, 1977) or such earlier expiration date as may be agreed to by the parties to an approved lease, capital cost reimbursement shall be made pursuant to subdivison (e) of this section notwithstanding any extension or renewal of such lease or the execution of a new lease by or on behalf of the facility; provided, however, that the commissioner may, in his discretion, continue capital cost reimbursement for such leased facilities pursuant to this subdivision, at a rental amount approved by the commissioner prior to such extension or renewal, and not pursuant to subdivision (e), upon his finding that there is a public need for such facility at the time and place and under the circumstances proposed and that the continued operation of such facility would be jeopardized by a limitation of reimbursement pursuant to subdivision (e).

(d) The provisions of subdivision (e) of this section shall not apply to hospital-based residential health care facilities. Such facilities will be reimbursed pursuant to capital cost regulations in Subpart 86-1 of this Part.

(e) (1) Subject to the provisions of subdivisions (c), (d) and (f) of this section, the capital cost component for every facility shall consist of the payment factors provided in this subdivision that, in any year of useful facility life, are applicable to the facility.

(2) Interest. The capital cost component shall, in each year of useful facility life, include a payment factor sufficient to reimburse, at a rate which the commissioner finds to be reasonable under the circumstances prevailing at the time of the placing of the capital indebtedness, interest on capital indebtedness.

(3) Amortization. (i) Subject to the limitations of paragraph (5) of this subdivision, the capital cost component shall, in each year of useful facility life, include a payment factor sufficient to reimburse the amortization component of capital indebtedness pursuant to the terms of the mortgage note or bond.

(ii) The capital indebtedness of a facility, to the extent that the original principal of such debt does not exceed the initial allowed facility cost of the facility, shall be recognized as follows:

(a) For capital indebtedness with an effective term of 10 years or less, amortization expense will be recognized for the purpose of reimbursement only, if the schedule of debt amortization is within the limitation set forth in section 86-2.21(e)(5) of this Subpart for each of the years of debt amortization.

(b) For capital indebtedness with an effective term in excess of 10 years, amortization expense will be recognized for the purpose of reimbursement upon a determination by the commissioner that the following standards are met:

(1) the debt is incurred for authorized purposes;

(2) the interest rate is reasonable for the time and place in which the capital indebtedness is committed, and for the type of indebtedness associated with the interest rate;

(3) the amortization schedule is reasonable (amortization must be required in each year of the mortgage in accordance with the established financial practices);

(4) the effective term is consistent with customary commercial practices in the geographic area of the facility; and

(5) the effective term is in accordance with efficient production of services.

(c) For capital indebtedness other than first mortgages, the amortization expense will be recognized for the purpose of reimbursement upon a determination by the commissioner that the debt, complies with the standards set forth in section 86-2.21(e)(3)(ii)(b) of this Subpart, and the following additional standards:

(1) they must be incurred for the purpose of financing either an approved purchase or construction of a facility; and

(2) the effective term of financing for a capital improvement is reasonable when compared to the estimated useful life of the improvement.

(d) Capital indebtedness for any unauthorized purpose will not be recognized for any reimbursement purpose.

(4) Return of equity. Subject to the limitations of paragraph (5) of this subdivision, the capital cost component shall include a payment factor sufficient to return equity. A facility shall be eligible for the return of equity commencing in the first year following the department's determination, among other factors, that the facility has the ability to meet current capital indebtedness (including principal and interest) over the balance of useful facility life. This shall mean that within the confines of the regulations expressed in this Subpart, capital reimbursement will be sufficient to provide for the remaining amortization of capital indebtedness. The commissioner's determination shall also take into account such factors as the age, size, location and condition of the facility, and the financial condition of the facility.

(5) Limitation. Annual reimbursement payments for capital cost under paragraphs (3) and (4) of this subdivision shall not at any time result in a cumulative average payment in excess of three and three one-hundredths percent of initial allowed facility cost. For years prior to 1981, actual amortization or depreciation paid by Medicaid will be used in the computation of the limitation. For years prior to Medicaid or in years when Medicaid payments did not include an expense equivalent of depreciation or amortization, a three and three one-hundredths percent payment will be imputed.

(6) Return on equity. The capital cost component for every facility shall include a payment factor sufficient to pay an annual rate of return on average equity, as such average annual equity shall be determined by the commissioner in each year of useful facility life.

(7) Residual reimbursement. After the expiration of useful facility life, the commissioner may approve a payment factor for any facility for which he determines that continued capital

cost reimbursement is appropriate; provided, however, that such payment factor shall not exceed one half of the capital cost reimbursement received by such facility in the final year of useful facility life.

(8) Capital improvement cost reimbursement. (i) The capital improvement cost shall be reimbursed by adjusting the initial allowed facility cost, capital indebtedness, equity determinations and limitations as stated in paragraph (5) of this subdivision, to include the capital improvement cost.

(ii) Adjustments in accordance with subparagraph (i) of this paragraph shall be made in the following manner:

(a) if the cost of an improvement is $100,000 or more, and certificate of need approval has been granted by the commissioner, then component useful life for the improvement will be permitted. Such component useful life will be equivalent to the estimated asset life in accordance with the *Medicare Provider Reimbursement Manual* or the remaining useful life of the facility, whichever is less. Where a capital improvement adjusts the expected useful life of the facility beyond the remaining portion of the original useful facility life, the limitation set forth in section 86-2.21(e)(5) of this Subpart, will be increased to allow for the reimbursement of the amortization component of the debt obtained to finance the improvement.

(b) If the cost of an improvement is less than $100,000, then the cost will be reimbursed over the remaining portion of the expected useful life. In such instances the reimbursement will commence with either the reporting of such costs on an annual certified cost report or, upon submission of a cost report, certified by an independent public accountant, whichever is submitted first. In either event, the reporting of such costs must be accompanied by a sworn statement by the administrator or the chief fiscal officer of the facility to the effect that the improvements made are not part of a number of planned related projects which, in the aggregate, total $100,000 or more.

(c) If the cost of an improvement is less than $100,000 and:

(1) is undertaken as the result of an emergency situation;

(2) affects the health and safety of the patients; and

(3) the facility can demonstrate dire financial condition;

then the limitation set forth in section 86-2.21(e)(6) of this Subpart will be modified to allow for the reimbursement of the debt service associated with the financing of the approved capital improvement over the effective term of the obligation or five years, whichever is greater. Any contribution to the improvement by the facility and not financed by the debt obligation will be considered an equity contribution and an adjustment to the facility's total capital equity will be made.

(d) If a facility undertakes an authorized improvement without incurring additional debt, then the facility will receive a return on equity and, when a determination has been made in accordance with section 86-2.21(e)(4) of this Subpart, a return of equity, for the funds invested in the improvement.

(f)(1) With respect to facilities granted operating certificates prior to March 10, 1975, the commissioner may modify or provide exceptions to subdivision (c) or (e) of this section in circumstances where he finds that application of the provisions of either subdivision would result in (i) excessive reimbursement to the facility, or (ii) severe economic hardship to the facility not caused by circumstances reasonably under the control of the facility. In determining severe economic hardship, the commissioner shall consider such factors as debt service required on capital indebtedness, prior withdrawal of assets from the facility, and the financial condition of the facility in general. In such cases where the commissioner makes a finding of severe economic hardship, the capital cost component of the rate shall not exceed the debt service on capital indebtedness.

(2) The commissioner may revise the capital cost component of the reimbursement rate applicable to any facility which he determines is based upon previous error, deceit or any other misrepresentation or misstatement by the facility.

(3) The capital cost component shall not be affected by any sale, lease or transfer occurring after March 10, 1975.

(g) In lieu of determining initial allowed facility cost pur-

suant to subdivision (a) of this section, the commissioner may estimate the original fair and reasonable cost of the facility with due regard for the fair and reasonable cost of facilities of comparable age, size, location and condition, and impute an initial allowed facility cost to:

(1) every facility for which records on the historical cost or book value of land, building or nonmovable equipment are not available or not verifiable to the satisfaction of the commissioner;

(2) every leased facility which, as of the effective date of this section, is not eligible for reimbursement pursuant to subdivison (c) of this section;

(3) every facility which, after the effective date of this section, ceases to be eligible for reimbursement pursuant to subdivision (c) of this section and becomes eligible for reimbursement pursuant to subdivision (e) of this section; or

(4) every facility whose construction was completed prior to the calendar year in which this section becomes effective and whose initial facility year occurs in or after the calendar year in which this section becomes effective.

(h) In the event that a facility fails to submit information necessary for the implementation of this section, after notification pursuant to subdivision (f) of section 86-2.2 of this Subpart, the capital cost component of the rate shall consist of interest, if reported, and amortization not in excess of the lesser of the amortization payment required under capital indebtedness, or 2½ percent of initial allowed facility cost.

(i)(1) The limitation provision of paragraph (e)(5) of this section may be waived for certain qualifying facilities. In order to be considered a qualifying transaction, all of the following conditions must be met:

(i) A sale or transfer between nonrelated parties must take place.

(ii) The purchaser must assume the seller's remaining mortgage repayment schedule at the associated fixed rate of interest.

(iii) The difference between the unpaid principal balance of the seller's mortgage (first mortgage) and the Medicaid-allowable transfer price must be generated either from second

mortgage proceeds or contributed equity capital or both.

(iv) The annual amount of allowable interest expense incurred as described in this section, under the terms of the first and second mortgage, plus the annual principal debt amortization must be less than that which would otherwise be reimbursed pursuant to this section, if no assumption of the existing first mortgage were made. (This comparison is hereinafter referred to as the comparative analysis test.) For purposes of this subdivision, the loan-financed portion of the Medicaid-allowable transfer price shall be held constant and the comparative analysis test shall be applied to each year of the effective term of the first and second mortgages. In instances where more than one facility is involved in the transaction, the facilities may be combined for purposes of the comparative analysis test.

(2) Qualifying facilities shall be reimbursed principal debt amortization, interest and return of equity in the following manner:

(i) Principal debt amortization. In each year, during the effective term of the mortgage, the capital cost component of the rate shall include a payment factor sufficient to reimburse the principal debt amortization component of the allowable portion of the mortgage.

(ii) Interest. The capital cost component shall include a payment factor sufficient to reimburse interest associated with the allowable portion of the mortgage as defined by paragraph (e)(2) of this section.

(iii) Return of equity. The equity portion of the Medicaid-allowable transfer price shall be reimbursed in equal annual amounts beginning in the first year following the expiration of the term of the mortgages over the remaining useful facility life.

Historical Notes

Sec. filed Sept. 30, 1976; amds. filed Nov. 29, 1976; Jan. 26, 1977; Feb. 28, 1977; repealed, new filed Sept. 28, 1977; amds. filed: Oct. 25, 1978; Dec. 22, 1978; Oct. 31, 1980; Dec. 15, 1980 eff. Dec. 15, 1980. Added (i).

86-2.22 Movable equipment. Necessary and reasonable expenses related to movable equipment (depreciation computed on a straight-line method or ac-

celerated under a double declining balance on sum-of-the-years-digits method, interest on indebtednesss, lease, etc.) are considered allowable costs for residential health care facilities subject to such ceilings as may be established and promulgated by the Commissioner of Health.

Historical Note

Sec. filed Sept. 30, 1976; amd. filed Jan. 25, 1977 as emergency measure; made permanent by order filed Feb. 28, 1977 eff. Feb. 28, 1977.

86-2.23 Research. (a) All research costs shall be excluded from allowable costs in computing reimbursement rates.

(b) Research includes those studies and projects which have as their purpose the enlargement of general knowledge and understanding, are experimental in nature and hold no prospect of immediate benefit to the hospital or its patients.

Historical Note

Sec. fileSept. 30, 1976; amd. filed Jan. 25, 1977 as emergency measure; made permanent by order filed Feb. 28, 1977 eff. Feb. 28, 1977.

86-2.24 Educational activities. The costs of educational activities, less tuition and supporting grants, shall be included in the calculation of the basic rate, provided such activities are directly related to patient care services.

Historical Note

Sec. filed Sept. 30, 1976; amd. filed Jan. 25, 1977 as emergency measure; made permanent by order filed Feb. 26, 1977 eff. Feb. 26, 1977.

86-2.25 Compensation of operators and relatives of operators. (a) Reasonable compensation for operators or relatives of operators for services actually performed and required to be performed shall be considered as an allowable cost. The amount to be allowed shall be equal to the amount normally required to be paid for the same service provided by a nonrelated employee, as determined by the State Commissioner of Health. Compensation shall not be included in the rate computation for any services

which the operator or relative of the operator is not authorized to perform under New York State law or regulation.

(b) Any amount reported as compensation for services rendered by an operator or relative of an operator shall not be allowed in excess of the maximum allowable for full-time services in carrying out his primary function.

(c) For purposes of subdivision (a) of this section, in determining a reasonable level of compensation for operators or relatives of operators the commissioner may consider the quality of care provided to patients by the facility during the year in question.

Historical Note

Sec. filed Sept. 30, 1976; amd. filed Jan. 25, 1977 as emergency measure; made permanent by order filed Feb. 28, 1977 eff. Feb. 28, 1977;

86-2.26 Costs of related organizations. (a) A related organization shall be defined as any entity which the residential health care facility is in control of or is controlled by, either directly or indirectly, or where an association of material interest exists in an entity which supplies goods and/or services to the residential health care facility, or any entity which is controlled directly or indirectly by the immediate family of the operator.

APPENDIX J

§3. [Jurisdiction of court of appeals]

a. The jurisdiction of the court of appeals shall be limited to the review of questions of law except where the judgment is of death, or where the appellate division, on reversing or modifying a final or interlocutory judgment in an action or a final or interlocutory order in a special proceeding, finds new facts and a final judgment or a final order pursuant thereto is entered; but the right to appeal shall not depend upon the amount involved.

b. Appeals to the court of appeals may be taken in the classes of cases hereafter enumerated in this section;

In criminal cases, directly from a court of original jurisdiction where the judgment is of death, and in other criminal cases from an appellate division or otherwise as the legislature may from time to time provide.

In civil cases and proceedings as follows:

(1) As of right, from a judgment or order entered upon the decision of an appellate division of the supreme court which finally determines an action or special proceeding wherein is directly involved the construction of the constitution of the state or of the United States, or where one or more of the justices of the appellate division dissents from the decision of the court, or where the judgment or order is one of reversal or modification.

(2) As of right, from a judgment or order of a court of record of original jurisdiction which finally determines an action or special proceeding where the only question involved on the appeal is the validity of a statutory provision of the state or of the Untied States under the constitution of the state or of the United States; and on any such appeal only the constitutional question shall be considered and determined by the court.

(3) As of right, from an order of the appellate division granting a new trial in an action or a new hearing in a special proceeding where the appellant stipulates that, upon affirmance, judgment absolute or final order shall be rendered against him.

(4) From a determination of the appellate division of the supreme court in any department, other than a judgment or order which finally determines an action or special proceeding,

where the appellate division allows the same and certifies that one or more questions of law have arisen which, in its opinion, ought to be reviewed by the court of appeals, but in such case the appeal shall bring up for review only the question or questions so certified; and the court of appeals shall certify to the appellate division its determination upon such question or questions.

(5) From an order of the appellate division of the supreme court in any department, in a proceeding instituted by or against one or more public officers or a board, commission or other body of public officers or a court or tribunal, other than an order which finally determines such proceeding, where the court of appeals shall allow the same upon the ground that, in its opinion, a question of law is involved which ought to be reviewed by it, and without regard to the availability of appeal by stipulation for final order absolute.

(6) From a judgment or order entered upon the decision of an appellate division of the supreme court which finally determines an action or special proceeding but which is not appealable under paragraph (1) of this subdivision where the appellate division or the court of appeals shall certify that in its opinion a question of law is involved which ought to be reviewed by the court of appeals. Such an appeal may be allowed upon application (a) to the appellate division, and in case of refusal, to the court of appeals, or (b) directly to the court of appeals. Such an appeal shall be allowed when required in the interest of substantial justice.

(7) No appeal shall be taken to the court of appeals from a judgment or order entered upon the decision of an appellate division of the supreme court in any civil case or proceeding where the appeal to the appellate division was from a judgment or order entered in an appeal from another court, including an appellate or special term of the supreme court, unless the construction of the constitution of the state or of the United States is directly involved therein, or unless the appellate division of the supreme court shall certify that in its opinion a question of law is involved which ought to be reviewed by the court of appeals.

(8) The legislature may abolish an appeal to the court of appeals as of right in any or all of the cases or classes of cases

specified in paragraph (1) of this subdivision wherein no question involving the construction of the constitution of the state or of the United States is directly involved, provided, however, that appeals in any such case or class of cases shall thereupon be governed by paragraph (6) of this subdivision.

(9) The court of appeals shall adopt and from time to time may amend a rule to permit the court to answer questions of New York law certified to it by the Supreme Court of the United States, a court of appeals of the United States or an appellate court of last resort of another state, which may be determinative of the cause then pending in the certifying court and which in the opinion of the certifying court are not controlled by precedent in the decisions of the courts of New York.

(Adopted Nov. 7, 1961; amended Nov. 5, 1985.)

Historical Note

1985 Amendment. Amendment Nov. 5, 1985, added par. (9) to subd. b.

Derivation. Cost. of 1894, Art. 6, §9, renumbered Art. 6, §7 in 1925; amended 1943; 1951; and repealed eff. Sept. 1, 1962.

Former Art. 6, §3. Section, adopted Nov. 3, 1925, related to the appellate terms of the supreme court, and was repealed eff. Sept. 1, 1962. See now section 8 of this article.

Cross References

Admission of attorneys and councellors, rulemaking power, see Judiciary Law §53.

Civil cases, appeals of, see CPLR 5501 et seq., 5601 et seq.

Criminal cases, appeals of, see CPL §§450.70 to 450.90, 460.10 et seq., 470.10 et seq.

Rules of practice, power of court to make, see Judiciary Law §51.

Library References

Courts 237(1), (2).

Criminal Law 86 et seq.

C.J.S. Courts §§429, 430.

C.J.S. Criminal Law §122.

APPENDIX K

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS—CIVIL TERM—PART: 6

COBBLE HILL NURSING HOME, INC.,
PLAINTIFF,

-against-

HENRY AND WAREN CORPORATION, action number one, AND DAVID AXELROD, M.D., COMMISSIONER OF THE STATE OF NEW YORK DEPARTMENT OF HEALTH, additional defendant on counterclaims,
DEFENDANTS.

HENRY AND WARREN CORPORATION,
PLAINTIFF

-against-

DAVID AXELROD, M.D., COMMISSIONER OF THE STATE OF NEW YORK DEPARTMENT OF HEALTH,
DEFENDANTS.

---

360 ADAMS ST.,
Brooklyn, New York
Dec. 16, 1986

BEFORE:
HONORABLE GERALD HELD, Justice

APPEARANCES:
CULLEN AND DYKMAN, ESQS.,
Attorneys for the Plaintiff
177 Montague St.,
Brooklyn, New York
BY: CYNTHIA BOYER OKRENT, ESQ.,

RAPPAPORT & FROST, ESQS.,
Attorneys for the Henry and Warren Corporation
225 Broadway
New York, New York
BY: JOSEPH FROST, ESQ.

ROBERT ABRAMS, ESQ.,
ATTORNEY GENERAL
Attorney for David Axelrod
120 Broadway
New York, N.Y.
BY: RANDOLPH VOLKELL, ESQ.,
AND JOSEPH P. PERRETTA, ESQ.

ALSO PRESENT: MR. GORNLEY
BRIAN D. DI GIOVANNA
OFFICIAL COURT REPORTER

THE COURT: Miss Okrent, you are representing the Plaintiff?

MS. OKRENT: That's correct.

THE COURT: Mr. Frost, you are representing Henry and Warren Corporation?

MR. FROST: In action number one and action number two.

THE COURT: And Mr. Vockell, you are representing the State of New York and Department of Health and Axelrod, is that correct?

MR. FROST: That's correct, your Honor, third-party Defendant in action number one and the defendant in action number two.

THE COURT: And now we have Joseph Perretta; who are you representing, sir?

MR. PERRETTA: I'm also an assistant attorney, assisting Mr. Volkell in his proof, of the office of Robert Abrams, the commissioner.

THE COURT: Only one of you is going to have a speaking role, because only one of you is going to conduct this trial, you understand that, don't you?

MR. VOLKELL: Your Honor, Mr. Perretta has worked with

a witness on one aspect of the proof for several years and would probably facilitate and expedite matters if he were able to put on that witness.

THE COURT: I do not mind you dividing the witnesses, but both of you will not question the same witness.

MR. VOLKELL: No, your Honor, we are just dividing the witnesses.

THE COURT: Okay, fine.

Mr. Gormley, what are you doing here?

MR. GORMLEY: I am representing the State of New York, the commissioner, and I was asked to sit here by the Attorney General.

MR. VOLKELL: Mr. Gormley represents—

THE COURT: Mr. Gormley, once again, you are going to have a very passive role?

MR. VOLKELL: Mr. Gormley is the client.

MR. FROST: He's not an attorney.

THE COURT: Well, you want him here at the counsel table, by all means. We can get another table and all of you have can have your clients sit with you as well.

Now, counselors, I am going to take opening statements from eeach of you, and I am going to ask each of you to tell me that which you contest, and that which is not contested, obviously by process of elimination, will be uncontested by way of the facts of this case.

What are the issues, first from you Plaintiff, Miss Okrent?

MS. OKRENT: Thank you, your Honor. This is an action for specific performance by Cobble Hill Nursing Home of an agreement to convey a nursing home facility located at 380 Henry Street in Cobble Hill.

In August 1975, Eugene Hollander, who was then the owner and operator of a number of nursing homes, including the nursing home in Cobble Hill, asked the Department of Health to appoint receivers to operate his nursing homes including the one in Cobble Hill.

Between August 1975 and May 1976, the attorneys representing Mr. Hollander and his corporation, Henry and Warren, negotiated with the Health Department with respect to the terms and conditions of the receivership agreement.

The receivership agreement and lease—in issue in this case and which resulted from those negotiations, were then signed in May 1976. The Plaintiff, Cobble Hill has been operating the nursing home since that date.

Cobble Hill has an option to purchase the nursing home under the receivership agreement and lease. The agreements provide that the price is to be determined by the Department of Health in accordance with the Public Health Law and the applicable rules and regulations.

In late 1979 Cobble Hill exercised its purchase option.

THE COURT: When?

MS. OKRENT: In late 1979. And on January 24th, 1980, the Department of Health determined the purchase price. Henry Warren has refused to convey at that price.

Cobble Hill commenced this action and moved for summary judgment. At a motion conference, Henry and Warren consented to the Court's granting Cobble Hill specific performance reserving—

THE COURT: Who is Henry?

MS. OKRENT: Henry and Warren is the owner.

THE COURT: You are talking about the corporation. You sounded like you were talking Henry Warren. It is Henry and Warren Corporation.

MS. OKRENT: Yes.

THE COURT: Thank you.

MS. OKRENT: Henry and Warren Corporation consented to the Court's granting specific performance, reserving only its right to contest the financial matters, what we understood to be the purchase price and its claim for rents under the Department's—contesting the Department's determination of the rent that had been paid under the agreement.

This Court, therefore, granted Cobble Hill's motion for summary judgement, except for financial matters, granted Henry and Warren discovery from the Department of Health with respect to the calculation of the price and the rent, directed Henry and Warren and the Department of Health to confer with respect to the calculation of the price and the rent, and directed that in the event Henry and Warren could not agree with the Department of Health, that there be—that the issues be reserved for the Court's determination.

The issue of this hearing, therefore, as I understand, is whether the Department of Health properly calculated the price in accordance with its rules and regulations, or whether Henry and Warren is entitled to an adjustment of the price.

THE COURT: What is your position?

MS. OKRENT: My position is they properly determined the price and that we are entitled to specific performance at the price in the January 24th, 1980 letter.

Despite the stipulation, Henry and Warren maintains that the option agreement is unenforceable, claiming that there are no rules and regulations by which to determine the price. Our position is Henry and Warren's claim—

THE COURT: I'm not quite sure the record is clear on that statement.

The Defendant, the Henry and Warren Corporation, is contesting the criteria that was used, the existence or nonexistence of the rules in order which to compute price, is that what you are saying? Would you be a lot more specific?

MS. OKRENT: (Non-verbal gesture made.)

THE COURT: Yes, you. You made a statement that they are contesting it. Tell me what your understanding—

MS. OKRENT: My understanding of what Henry and Warren's position is, is that there are no rules and regulations, pursuant to which a price determination can be made.

Our position is that the intent of the parties under the contract, and it is clear in our minds under the language of the "contract", that the party—the intent was that the Medicaid reimbursement rules and regulations would be the regulations pursuant to which the price would be determined.

THE COURT: What does the contract say?

MS. OKRENT: It says, pursuant to the public—it says—there are numerous provision that relate—

THE COURT: What are the provisions of the contract? What are the provisions of the contract that you lay claim to or hang your hat upon so to speak?

MS. OKRENT: All right.

THE COURT: And first let's get the contract into evidence. I think it can be undisputed and agreed upon and stipulated that the contract should go in evidence, is that right, counselors?

MR. FROST: I have no problem.

MR. VOLKELL: I have no objection.

THE COURT: Give me a copy of the contract.

MS. OKRENT: Here is the receivership agreement and here is the lease.

Since this is a motion for summary judgment, all of the relevant documents are already in the record on the motion. I have copies—

THE COURT: Have you subpoenaed or requisitioned a file for the Court?

MS. OKRENT: On the summary judgment motion?

THE COURT: Now. On this hearing. On this trial. We are having a trial.

MS. OKRENT: My understanding, your Honor—

THE COURT: I'm holding a full hearing to determine all of the issues herein. To wit: The issue of number one, the criteria; and number two: The amount.

Now, when this Court allowed counsel to enter into a stipulation granting to the Plaintiff summary judgment, leaving the price, the amount, contract price open, the Court was led to believe that this is a matter of merely computation, that there are regulations.

I have since learned that it is the allegation of Mr. Frost and his client, and please correct me if I'm mistaken Mr. Frost, that there are no such regulations that he can find, and he says that the computation therefore is mistaken, irregular and improper. Is that correct?

MR. FROST: That's correct.

THE COURT: Now, this is my grasp of the situation based upon our conferences, all of us.

Now, I understand then, the State of New York Department of Health is more or less, well, I hesitate to use the phrase, an interested bystander, but it wants to protect the public interest. Is that correct?

MR. VOLKELL: That's correct, your Honor. We certainly do want to protect the public interest.

THE COURT: And what stake do you have, sir, in the amount of money to be paid by the Plaintiff to the Defendant?

MR. VOLKELL: Well, that is a twofold question.

THE COURT: When I say you, I mean your client, of course.

MR. VOLKELL: Clearly. In the first instance, with respect to object interpretation of the contract, if the Court were to rule that Mr. Frost's interpretation were correct and Miss Okrent's incorrect, and that the contract did not call for a determination of the price pursuant to our reimbursement regulations, then conceivably, the price that the Defendant set on the nursing home would be higher than the reimbursement price; Miss Okrent's client would not be able to pay it or at least we would not be able to reimburse the Plaintiff for anything higher than the reimbursement price, therefore, the price would be higher than Plaintiff could pay, and the nursing home would cease to go exist as a nursing home.

As a nursing home, we can only reimburse any operator for a cost pursuant to our regulation. So, in the first instance, we have no specific, physical interest, necessarily, because if the price were determined to be higher than the reimbursement price, there would be no sale to the Plaintiff and we would make no reimbursement. We would, however, have to find beds for 520 nursing home patients.

In the second instance, if the Court were to determine that the—

THE COURT: Or in the alternative, if Cobble Hill Nursing Home Incorporated cannot meet the price, then you would have to get another operator of this facility.

MR. VOLKELL: Theoretically that is possible, your Honor. However, in practice, it is very, very unlikely. Since any operator could only be reimbursed to the extent allowed by the regulations. In other words, the operator that proposes—well, there might very, theoretically, be such an operator.

THE COURT: Perhaps the Henry and Warren Corporation, is faced at either accepting the figures that is given or closing down the home and using it as a different type of facility, perhaps turn it into condominiums, that seems to be the trend in our days.

MR. VOLKELL: Again, first there's the question did they at least—I understand—

THE COURT: Mr. Frost, I'm not in any way suggesting what your client should do, that you understand?

MR. FROST: Absolutely, Judge.

MR. VOLKELL: If the contract with Miss Okrent's client were unenforceable, that would appear to be the option. However, if the contract is enforceable at the reimbursement price, Mr. Frost's client does not have that option, he's bound by contract.

THE COURT: Are you telling me, Mr. Volkell, that the question here really is, whether by the terms of contract, it is an enforceable contract, or that it is void, is that was telling me?

MR. VOLKELL: I think that is—well, the question is—

THE COURT: I sort of brought it down to the common denominator.

MR. VOLKELL: I think that is almost right. I'm not sure I would agree completely. I know it is economically pretty clear.

THE COURT: What are the alternatives in both sides, in your opinion, Mr. Volkell?

MR. VOLKELL: All right. The alternatives—

THE COURT: How can this Court—what are the various ways that this Court can decide this matter? In your opinion.

MR. VOLKELL: The question of the contract. Because after the contract, if we found it to be reimburseable—

THE COURT: Isn't that a threshold question?

MR. VOLKELL: Clear, that's the threshold question. There are other possibilities afterwards, but at the threshold—

THE COURT: The threshold question, can we agree, that first this Court has to look at the contract and determine whether it is a valid contract, that is to say—

MR. VOLKELL: That is exactly correct.

THE COURT: That is to say, if it is enforceable.

MR. VOLKELL: That's exactly correct.

THE COURT: If I say, yes, we go into the next step. But if I say, no, that is the end of this case. Isn't it?

MR. VOLKELL: I think that's right.

THE COURT: Does anybody disagree with that? Mr. Frost?

MR. FROST: I do not, your Honor, no.

THE COURT: Miss Okrent, do you agree that there's a threshold question?

MS. OKRENT: Yes.

THE COURT: I'm not suggesting how I am going to decide it, but I'm asking you if you agree that this Court would either find, yes, it's a viable, good contract, and then we go into the other issues, or the Court decides, no, it is not a viable, good contract, in which event, that is the end.

MS. OKRENT: Your Honor, my impression from the stipulation was the same as yours. What we were moving into was merely a calculation of the price.

THE COURT: Ma'am, you are going to find that no matter how you try to sidestep, and I'm not suggesting you are, that I am going to keep repeating the question until I get an answer. Read back the question, please.

(Record read.)

MS. OKRENT: Your Honor, in my view, that is a threshold question which I thought had been conceded when the stipulation granting specific performance—

THE COURT: Well, it is obvious that you are mistaken because that is not the position of your adversary. And I never understood it to be the positions of your adversary. I went along with the stipulation after many conferences because—I'm not suggesting anyone led me down a primrose path, but I really thought that this matter was being negotiated in good faith, and I will still assume that it had been negotiated in good faith; and I

assumed, wrongfully, obviously, that this matter would be settled if I gave you people enough time to sit around the table together and I know you discussed it, because I was told that, but unfortunately my conclusion that it would be settled was erroneous. It is obvious it was not, and so, therefore, the Court Sua Sponte opens up this can of worms, in a manner of speaking, and the Court will have to, under the circumstances, look at the contract to determine whether or not it is, in fact, an enforceable contract by its terms applying strict contract law. Do you disagree with that position? And if so, tell me why.

MS. OKRENT: No, your Honor.

THE COURT: Okay. Thank you. Excuse me one second.

(Short pause in proceedings.)

THE COURT: Counselors, now that we've agreed that the threshold issue is the contract, I would suggest that you submit to me a copy of the contract, an accurate copy of the contract, and that will be received in evidence as joint exhibit number one. Agreed?

MR. FROST: Yes, your Honor.

MS. OKRENT: Yes.

MR. VOLKELL: Yes.

THE COURT: The Clerk will mark it as joint exhibit number one. The contract and the indenture of lease, is that right?

MS. OKRENT: Yes. Receivership agreement and a lease.

THE COURT: Joint exhibit number one.

Now, in support of the position of the Plaintiff, can you indicate to me what particular paragraphs of the joint exhibit number one that the Plaintiff realize upon?

MS. OKRENT: Yes, your Honor. I submitted a brief in which I have, in the initial state of facts, cited, it is my brief dated—

THE COURT: Which brief is it?

MS. OKRENT: September 15, 1986. It is entitled supplemental—

THE COURT: I have that brief. I also have another brief that is dated December 11, 1986. You want me to read the earlier one?

MS. OKRENT: The earlier one sets forth all paragraphs of the receivership agremeent and lease that pertain to the rent and the—

THE COURT: You are going to rely upon the information contained in your supplemental memorandum of law, which predates your memorandum of law. I don't know how a supplemental can predate the memorandum, but I guess you work your wonders in strange fashion.

MS. OKRENT: The December brief, your Honor, pertains to the calculation under the regulations. The prior September brief pertains to the contract interpretation issue.

THE COURT: All right.

MS. OKRENT: But those are the relevant provisions in our view.

THE COURT: Either way, this one dated September 15, 1986, you want me to read that. Is there anything that you want to add other than that which is contained within this, on that subject, concerning the lease—excuse me, the contract?

MS. OKRENT: Well, your Honor, yes, your Honor. It is our position, initially, that after you read the contracts and the memo, that as a matter of law, the Medicaid reimbursement regulations used by the Department to determine the price are the applicable—are the ones that were intended by the parties. If, however, the Court feels that it is not clear from the—from the contract language, I am prepared to put on parol evidence with respect to the intent of the parties as to that contract language.

THE COURT: Are you telling me that parol evidence can reform the terms of a contract?

MS. OKRENT: I think—no. I'm saying it can explain ambiguous terms. If it is not ambiguous, no.

THE COURT: Who drew this contract?

MS. OKRENT: Department of Health negotiated it.

THE COURT: Who drew it?

MS. OKRENT: It was a negotiated contract.

THE COURT: Who drew it?

MS. OKRENT: I don't know that any particular person drew any particular language. It was negotiated over—

THE COURT: Mr. Frost, who drew the contract?

MR. FROST: It is my understanding, your Honor, that the lease was drawn, the actual drawing of the lease was done by the Department of State and Cullen and Dykman, and my client ar-

rived and was told to sign it. That is the information I have. I was not the attorney at the time. But that is what I got from Mr. Fischman who represented my client.

MS. OKRENT: Your Honor, Cullen and Dykman was not involved.

THE COURT: How about you Mr. Volkell, what do you want to say on that subject?

MR. VOLKELL: It is my understanding, it may have actually been typed in the Department of Health's offices, I'm not sure about that, but it is my understanding the different provisions were proposed, negotiated and accepted, and they were proposed by different—by all of the parties. Of course I was not present at any of the negotiations, and I guess the witnesses that Miss Okrent proposed to you to use for parol evidence can tell you with great specificity, can tell—

THE COURT: Just a minute, please. Let me get in it in front of me. 9.02, and for the record it is reads as follows: "During the term of the lease, the tenant thereunder, shall have an option to purchase the premises at any time during said term at a price determined by the Department in accordance with the Public Health Laws and all applicable rules and regulations of the Department, without prejudice or remedies, if any, of the parties herein, subject to the following conditions.

"One: That the tenant, if it elects to exercise such option, shall not, later than the fourth anniversary, et cetera—I do not think that applies.

There is no problem on that, is that right?

MR. FROST: As I see it, the only issue on price was 9.02, unless they disagree.

MS. OKRENT: And also 9.03 goes on and reads—

THE COURT: Just a minute. I'm still on 9.02 however. 9.02B small letter i, that does not apply. That is on the option. Small letter double i, that doesn't apply either. Triple i doesn't apply, now we are up to 9.03.

MS. OKRENT: Your Honor, the only thing on—

THE COURT: Just a minute.

MS. OKRENT: Under i, I just would like to point out the language in the middle of the paragraph where it says the Department shall deliver to each of the landlord—

THE COURT: It says the following: "The Department shall deliver to each of the landlord and the tenant a notice called the 'price notice' stating the value so determined, hereinafter called the price, and setting forth a date, not more than 30 days, et cetera.

MS. OKRENT: I'd like to highlight the—stating "the value so determined". I think that language is relevant.

THE COURT: Yes. "Value so determined", and it will be determined in accordance with the Public Health Law and all applicable rules and regulations of the Department, without prejudice to remedies, if any, of the parties hereinunder, to the following conditions.

Now, 9.03 says, "Notwithstanding anything to the contrary contained heein or in the lease, the liability of the tenant for rent, additional rent or other liability, due tot he landlord or the operator hereunder, shall be limited to amounts finally determined by the Department or other applicable authority to be reimburseable under the Medicaid program or any successor program, and neither the landlord, the operator nor their successor and assigns, shall enforce any judgment against the tenant or receiver relating to the payment of any liability for which reimbursement has not been actually received by the tenant or receiver."

So what they are saying here is, as I understand it, that the liability of your client, Miss Okrent, shall be limited to that which is going to be reimbursed. Isn't that right?

MS. OKRENT: Yes.

THE COURT: How does that effect the price? That effects the collection of the price. It does not effect the price. The price is going to be determined pursuant to 9.02, quote, "In accordance with the Public Health Law and all applicable rules and regulations of the Department without prejudice to remedies, if any," et cetera.

Now I want to know, therefore, what are the Public Health Law and all applicable rules and regulations of the Department which determine this figure? And that I think Mr. Volkell will

have to answer. What did you use? How did you come to this figure that Mr. Frost says he doesn't like?

MR. VOLKELL: We used the regulations that determine how much Medicaid can reimburse the operator for the purchase of the home.

THE COURT: Why?

MR. VOLKELL: Those are the regulations that we understood to be referenced in that paragraph. In other words—

THE COURT: Is that your understanding when you entered into this agreement?

MR. VOLKELL: Yes, it was, your Honor.

THE COURT: Mr. Frost, was that your client's understand?

MR. FROST: Your Honor, there is no regulation established for the Department to establish price. They have a regulation that if I buy a nursing home, no matter what price I pay for it, they will only reimburse me for what they say the historical cost is, which is the rate of reimbursement that they are talking about, that is not price. I can buy the nursing home at any price, I can sell it at any price. And they have no regulations to establish a price.

THE COURT: But you understand, Mr. Frost, that the liability of Miss Okrent's client only is to the extent of what they get back from the State of New York.

MR. FROST: Absolutely.

THE COURT: You understand that.

MR. FROST: Yes, your Honor, I understand that. They have no further liability.

THE COURT: Okay. As long as you understand that. You cannot sue—let's assume arguendo, that I establish a price that is greater than the reimbursement price. Now you are going to want to reduce it to a judgment. You can only reduce it to the reimbursement price or otherwise call it quits.

MR. FROST: No, your Honor.

THE COURT: In other words, vitiate the contract.

MR. FROST: I do not believe that is true. I think it will come out during the trial, if there's evidence, that I can buy a nursing home and if I do not apply for Medicaid, I'm not bound by

their rules and regulations whatsoever. I can have a fully non-Medicaid home and charge whatever I like.

THE COURT: I want you to read this to you. I'm reading from 9.03: "The liability of the tenant for rent, additional rent or other liability due to the landlord or the operator hereunder, shall be limited to amounts foundly determined by the Department or other applicable authority to be reimburseable under the Medicaid program," et cetera.

Now, that question now in my mind, does that deal with the price, the purchase price, or does it just deal with the rent?

MR. FROST: That deals with the rent. As a matter of fact, our second action is to, is to establish that the reimbursement set by the Department of Health for this facility, was a violation of their own rule and regulations. They've already admitted that they owe us a million four-hundred thousand dollars by some miscalculation, and we can establish—

THE COURT: Is that right, Mr. Volkell?

MR. VOLKELL: Yes, that is approximately correct.

MR. FROST: And I think we can establish that it is many Miss of dollars more considering the trial. That only deals with reimbursement for Medicaid patients, that is all they deal with. It has absolutely nothing to do with the price.

I must point out to the Court that at this time, if this option isn't exercised, this lease is expired. So there's nothing under this lease that is applicable at this time. The question is: Did they exercise the option, pursuant to their rules and regulations? And to date, they haven't established one single regulation that deals with price. And Mr. Gormley and my expert have discussed this question, and we had conferences on it. This deals strictly with Medicaid reimbursement, and I do not think anybody would question that. The title, Capital Reimbursement Proprietary Residential Health Facilities, and that is reimbursement based on what they call historical cost.

They establish what they call historical cost and they reimburse you pursuant to a formula which we will explain. That deals solely with, if anything, reimbursement for capital cost which is equivalent to rent, your Honor. Has nothing to do with prices set for purchase and the value of a nursing home, ab-

that is—that has no Medicaid patients and I refuse to deal with Medicaid patients, I get full—I can set any price I want for the patients, they have nothing to do with reimbursement. See? So the value is not determined by how many—in fact, a nursing home is less valuable when you have nursing home patients. It becomes more available when you have private patients because you are not limited—they say that they will only recognize, no matter what I pay, they will recognize a limited amount for reimbursement purposes. So it is my option, either to buy or sell, knowing that they are only going to be limited in what they are going to pay me. But that does not establish the value of the property as such.

As you said, your Honor, if I want to discontinue a nursing home, this property's value is greater than they would be able to think of as a nursing home. It is much more valuable as other pieces of property than as a nursing home. So as I said, they have no rules and regulations to this time that deals with price.

THE COURT: I was asking Miss Okrent what the rules and regulations are that she also relies upon in setting that price, and she indicated 9.02 and 9.03 of the contract, but we still have to get into the rules and regulations.

MS. OKRENT: Your Honor—

THE COURT: First of all, before we do that, let's go back to the contract. Is there anything else in the contract that you rely upon?

MS. OKRENT: Yes, there are other provisions.

THE COURT: Where? Tell me.

MS. OKRENT: As to 9.03.

THE COURT: Yes?

MS. OKRENT: There are two things. One: It is our position that that indicates the intention of the parties with respect to any obligations. Number two—

THE COURT: I disagree with you.

MS. OKRENT: Under the lease—

THE COURT: Has to be read within the context.

MS. OKRENT: Right. And also along with the lease. And the two—the receivership agreement and the lease, were incorporated together, and under the lease, as soon as we exercise the contract, the option, it becomes a contract of sale, which is our

right to purchase at the reimbursement. Also—I'll go over the other provisions. The annual rent under both the receivership and the lease use almost the identical language. The rent, that we've paid for ten years, is determined by the Department of Health under the applicable rules and regulations. The rent we have paid, and they acknowledge has, in fact, been determined and is the Medicaid—under the Medicaid reimbursement rules and regulations, and—

THE COURT: I do not think that is agreed upon by your adversary.

MR. FROST: Not at all, your Honor. As I say, we challenge their method of fixing the rent.

THE COURT: I heard you the first time and, in fact, you told me you already caught them in at least a million four-hundred thousand dollars error which they acknowledge.

MS. OKRENT: That is the calculation of the figures, but there is not a dispute that it is calculated under the Medicaid reimbursement rules and regulations.

THE COURT: Okay. What else?

MS. OKRENT: So the methodology for rent is the same as the methodology for price. They value rental amounts and they value property costs.

THE COURT: So far you have shown me no reason for me to take any oral proof to clarify, as you put it, oral evidence to alter or show the intent of the parties with regard to an ambiguity in the contract. I don't see ambiguity yet.

MS. OKRENT: We are relying—

THE COURT: Show me an ambiguity.

MS. OKRENT: I do not think there are ambiguities. We differ as to the result.

THE COURT: Can we agree there are no ambiguities?

MR. FROST: Yes, your Honor, I agree.

THE COURT: Is there an ambiguity?

MR. VOLKELL: Well, I think we might agree there are no ambiguities. But we each have a different interpretation.

THE COURT: I understand all of that. That is what makes an ambiguity. Haven't you just defined ambiguity?

MR. VOLKELL: I think so. That is why it may be foolish.

THE COURT: Therefore, what evidence can I take—we

agree that the contract is ambiguous. Now I have to decide as a matter of law, whether the ambiguity in any way vitiates the contract. And I do not understand why we have 17 people in this courtroom of which, from what I can see, only four lawyers, or at least lawyers representing clients in this case. I would assume some of them, and hopefully not all, are purported witnesses. What kind of evidence am I to take? What kind of testimony am I taking?

I am going to take testimony from witnesses produced by each of you to establish that there was an ambiguity and this is the way they understood it? We can agree that there is a—there's a bonified difference of opinion, that's what we've agreed upon according to my understanding. You lawyers have a—your clients at least, have a bonified difference of opinion as to the meaning of pertinent provisions of the contract, i.e. an ambiguity.

MR. VOLKELL: At this point maybe it would be helpful to hear from some of the people who were present at the negotiations. The language used—

THE COURT: For what purpose?

MR. VOLKELL: The language used in that provision is language that those in the business—the language used there and language that flows in the business, we believe, all understood to mean one thing—

THE COURT: Wait a second. You just said something very interesting. You said, this is language used in the business. You mean, custom and usage within the trade as we learned it back in Contract Law 1? In law school many, many moons ago for me at least, well even beyond that—

Let me ask you a question, sir. Mr. Volkell, I would assume that you or your office at least, deals with this on an almost daily or weekly basis, on these matters. Have you got other contracts that you have used the same exact language in?

MR. VOLKELL: Not my office, but my client's office, your Honor.

THE COURT: Okay, your client's office then.

THE COURT: Mr. Gormley, do you have any other contracts that you use this language in?

MR. GORMLEY: That I'm not sure, your Honor. We have

other receivership agreements and there have been other agreements to sell. Whether that is exact language I'm not sure.

THE COURT: Are each of these receivership agreements, such as this type of matter, negotiated between you, the tenant, and the landlord? In other words, the then operator of the nursing home who is getting out, the one who is coming in and your Department, are they negotiated?

MR. GORMLEY: Yes, they are, your Honor.

THE COURT: And so therefore, if I wanted to go into the nursing home business and I had a really sharp lawyer, let's say like Miss Okrent or Mr. Frost, I could perhaps make a better deal than my law secretary who wants to go in the same business; he's not smart enough to retain Miss Okrent or Mr. Frost, he represents himself let's say, and so therefore, he doesn't get a good as deal or negotiate as good a deal, the language is a little different and the price is different and so forth, is that right?

MR. GORMLEY: Well—

THE COURT: Depends upon how sharp a trader you are?

MR. GORMLEY: No, your Honor.

THE COURT: Or negotiate that is?

MR. GORMLEY: Only, in my opinion, only if you are referring to the fact that when you write, when you sit down to write the receivership agreement, if, in fact, how you apply that language, your use of the words. But in terms of—in terms of receivership agreements and the receiverships that we have out there in nursing homes, and the receivership are there more as a custodian, if you will, of the facility—

THE COURT: Forgive me, are you an attorney?

MR. GORMLEY: No, I'm not.

THE COURT: Nothing wrong in that, sir. I just had to know.

MR. GORMLEY: There is nothing wrong at all.

THE COURT: What is your field of expertise?

MR. GORMLEY: By profession I'm an accountant and I run part of the finance division. We have responsibility for health care division in the State Department of Health. We have responsibility for determining the rates of payments for nursing home patients, Medicaid nursing home patients.

You said something very interesting. You said, depending upon how sharp your lawyer is or what lawyer you have, the language could be much different.

THE COURT: Subject to different interpretations I guess.

MR. GORMLEY: I felt that is really what you were asking me and what I was trying to—the answer I was trying to give you was that, in terms of the receivership agreement in the way we view receivership agreements, I think we try to keep them fairly and customary. Standard, if you will. Unfortunately, what seems to happen though—

THE COURT: Have you ever bought a home, sir?

MR. GORMLEY: Yes, I have.

THE COURT: And you went to contract and the seller's attorney presents a contract and he says this is the way we do it all the time, this is a printed form, this is standard, and then your lawyer begins to masculate, to cut out paragraphs and adding riders and addendums and makes changes and so on and so forth?

MR. GORMLEY: Yes, your Honor.

THE COURT: Isn't that what happened?

MR. GORMLEY: That is exactly what happened, yes.

THE COURT: I would have to assume that is what Miss Okrent are or at least her firm did, I don't know if Miss Okrent personally represented these people at the time?

MS. OKRENT: No, your Honor. Cullen and Dykman was not involved.

THE COURT: Perhaps that was their mistake.

MS. OKRENT: We came into the picture later.

THE COURT: Well, as I say, perhaps that was their mistake, I don't know who represented them and I do not want to know. Mr. Frost, did you represent—

MR. FROST: No, I did not represent—

THE COURT: Perhaps that was your client's mistake too.

You want to say something?

MR. VOLKELL: If I could finish answering the question, your Honor.

THE COURT: I thought you were rising to disagree about the choice of lawyers' firms. I believe, perhaps we would have all been better off had Miss Okrent and Mr. Frost been present

at the negotiations and—

THE COURT: We probably would not be here today.

MR. VOLKELL: And I been there as well. But, going back to the question of what parol evidence in—in what way it might help the Court, there are two lawyers who are here today who were present at the negotiation—

THE COURT: Lawyers who are employed by—

MR. VOLKELL: The Department of Health, and who, based on conversations that they had at the time, during the negotiations, I believe, and also based on exhibits that Miss Okrent has—

THE COURT: Counselor, you took your evidence courses in law school which were probably fewer years ago than mine.

MR. VOLKELL: I got an A.

THE COURT: You also got an A? Good. I'm glad to hear it. I not only got an A in evidence, but I got an A in the Civil Practice Act and Procedural Law. And you know what they did to me, a year or two after I graduated law school, three years or so after I graduated law school, they changed to it the CPLR. So my A went for naught. Fortunately, the rules of evidence haven't changed that much when it comes to contract law.

MR. VOLKELL: Clearly the evidence that we were suggesting would only be admissible if your Honor found an ambiguity.

THE COURT: Yes. Don't you think I have to first make that determination?

MR. VOLKELL: Yes, your Honor.

THE COURT: Okay. So we are not disagreeing, we are agreeing.

So therefore, Mr. Volkell, I have to ask you, what regulations—actually you told me you are using Medicaid reimbursement.

MR. VOLKELL: Yes, your Honor.

THE COURT: Is there anything that says, any regulation, that can reasonably be interpreted to say, that when a nursing home goes into receivership, and there is a receivership agreement for a purchase or for the option to purchase, and the price is to be determined by the Department of Health, based upon pertinent regulations, that the following regulations are the per-

tinent regulation which govern the sale?

MR. VOLKELL: No, your Honor. What we feel points to these regulations, and just for the record, let me give you the citation, it is 10 New York Code of Rules and Regulations, Section 86-2.21.

THE COURT: What does that say? Read it into the record.

MR. VOLKELL: Well, it is a lengthy regulation, it is attached to Miss Okrent's December brief which your Honor has.

THE COURT: All right. And are you—go ahead.

MR. VOLKELL: The title of it is Capital Cost Reimbursement for Proprietary Residential Health Care Facilities.

THE COURT: But is there suppose to be, based upon this contract, a capital cost to price?

MR. VOLKELL: Well—

THE COURT: In other words, is the price, pursuant to contract, to be determined by the capital cost reimbursement? We know that you are limited by the legislature to a reimbursement which is based upon capital costs. Does that bind the seller?

MR. VOLKELL: Ordinarily, in a vacuum, no it would not. But it is our understanding of the contract that was entered into between the seller and the purchaser and the—that we participated in, that the agreement was that the sale price would be that price which is reimburseable by us, and that is what activates this as the relevant rule and regulation. In other words, our interpretation of that provision of the contract is, that that provision, 9.02 9.03, those provisions, bring in this regulation.

THE COURT: 9.03 doesn't really deal with the sale, it deals with rent.

MR. VOLKELL: It would only deal with the sale if your Honor interpreted the phrase liability as a liability arising at the point at which Cullen and Dykman, rather Cobble Hill is obligated by contract to purchase the facilities, then they have an obligation, a liability for the purchase price, which might then be limited by 9.03.

THE COURT: That's right. But we first must deal with that threshold question. We can't get away from it. I cannot say, if I decide the contract is good, I decide the following: First I have to decide whether the contract is good.

MR. VOLKELL: That's correct.

THE COURT: You want to say something? I notice you are champing at the bit, Mr. Frost.

MR. FROST: It is rather shocking that Mr. Volkell takes the position.

THE COURT: You are not shocked by anything, are you?

MR. FROST: Well, it is a little shocking in the context of this argument concerning parol evidence. What he's saying is that there was an essential element of the contract, which is really the price. That was omitted. Although they understood in their minds that it should be something, they didn't write it in. That's not a ambiguity. They should move for rescission and reformation of the contract which they never did. This specifically deals only with reimbursement.

I defy them to give me one regulation that says that if you sell a nursing home, we restrict your price to X dollars. There is no such regulation. We looked high and low for it. Mr. Gormley acknowledges that I think, I mean at the last meeting we had. So since there is no regulation, there is no price, your Honor, and that is an essential element of a contract.

THE COURT: I thought I'd been saying that all along.

MR. FROST: You were, your Honor. I just wanted to bring that out. Seems somebody—

THE COURT: I haven't been saying it, I've been asking for it, let's put it that way.

Miss Okrent it is now your opportunity, please.

MS. OKRENT: Thank you, your Honor. Your Honor, the contract does provide for a method of determining the price. It has language that Price is to be determined in a specified manner.

THE COURT: You are absolutely correct.

MS. OKRENT: The question becomes what did the parties intend when they wrote those words. Our position is—

THE COURT: Just one second, please. I am sorry to interrupt you. But it says, it says, "At a price to be determined by the Department in accordance with the Public Health Law."

Now is there anything in the Public Health Law that would determine the price?

MS. OKRENT: Yes, your Honor. Under the Public Health Law 2808 and the regulations, the Department has a

methodology—

THE COURT: You talking about the Medicaid reimbursement rate or the capital, historical capital?

MS. OKRENT: The method of deermining property, allowable Medicaid transfer price of property, is in the regulations—

THE COURT: I am sorry, that's reimbursement price. I cannot agree with you there.

MS. OKRENT: That was the intent of the parties, that the reimbursement, allowable reimbursement cost, was what Cobble Hill would be permitted to buy this property at.

THE COURT: I disagree with you. And let's go on to the next phrase. Continuing. Quote "And all applicable rules and regulations of the Department."

Now, what are the applicable rules and regulations of the Department? Applicable? Are there any?

MS. OKRENT: The Medicaid—

THE COURT: You are going back to the same thing again, aren't you? Okay. Mr. Frost, I want to ask you this question:

Caption of this action is Cobble Hill against the Henry and Warren Corporation and David Axelrod, et cetera, Commissioner. And then there is, Henry and Warren Corporation the David Axelrod Commissioner, et cetera.

We've been dealing for the most part with the first named cause of action.

MR. FROST: Correct.

THE COURT: Let's assume, arguendo, that I determine that this contract is void for—it is vague and it is void and it is ambiguous and it is not a viable contract. Let's assume that for the moment. What do we have on the second action?

MR. FROST: The second action is an action for reimbursement of—

THE COURT: That's the million four that they agreed—that they agree they owe you, and you said, we agreed to that but we want more because we think you owe us more, is that what you are saying?

MR. FROST: They owe us about eight million on that.

THE COURT: Why does the Court have to determine that? I don't, because they are taking the position, they are take the position—isn't that an accounting matter?

MR. FROST: No.

THE COURT: That I can refer this to an accountant?

MR. FROST: No, your Honor, I think there's a question of historical cost, which is the foundation stone for applying a particular formula that they have. They have established historical cost based on some appraisal or some—

THE COURT: I'll tell you what I'm going to do—you want to say something on the subject, Mr. Volkell?

MR. VOLKELL: I was just going to say, I believe, again, there's a party missing in that, and to the extent that we—

THE COURT: Who is missing?

MR. VOLKELL: Cobble Hill. The extent we may owe money, we actually owe it to Cobble Hill. Cobble Hill may owe it to Mr. Frost's client. But we are unable to pay directly to Mr. Frost.

MR. FROST: It is a conduit.

MR. VOLKELL: There is a conduit.

THE COURT: You are saying there should be a necessary party added to it, to wit, Cobble Hill?

MR. VOLKELL: Correct.

THE COURT: I am going to make a determination, based upon the argument here: I find there is an ambiguity in the contract and I find it is void for vagueness and its ambiguity cannot and should not be resolved by any parol evidence; that it would be improper under the circumstance. It is a question that there's an ambiguity, and the price cannot be determined, and call it mutual mistake, call it what you wish, but it cannot be reformed as such.

I set aside this contract as being void under the circumstance of the terms of the contract, and impossibility of performance under the circumstances, and I direct counsel to provide me with findings of fact, conclusions of law and a judgment so holding. And in that judgment, you will provide for a severance of the second cause of action, which is Henry and Warren Corporation, Plaintiff, against Axelrod as Commissioner, et cetera, and provide for the adding of Cobble Hill Nursing Home as a defendant, necessary defendant, if only a conduit, nonetheless a necessary defendant, and provide a blank date for a hearing on

that which the Court will set. And in a separate letter you will provide me with your suggestions as to a date for the hearing.

I want to give you ample time to go over these figures, and one last ditch effort, since the State has already agreed to a rather substantial amount of money that they owe, perhaps the necessity of a trial on that subject or a hearing on that subject can be obviated.

MR. VOLKELL: First of all, I agree that maybe possible. But I was going to ask if we could make an offer of proof as to what witnesses would have testified to with respect to the parol evidence?

THE COURT: Certainly.

MR. VOLKELL: With respect to the contract so that would be the first case.

THE COURT: By all means. You are entitled to that.

MS. OKRENT: Your Honor, I would like, specifically, a ruling that we have offered the evidence with respect to the intent of the parties on the meaning of the contract, including the testimony of two attorneys who participated from August 75 to May of 76, in the negotiations, directly with Mr. Hollander and his attorneys, with respect to—

THE COURT: Who is Mr. Hollander?

MS. OKRENT: Mr. Hollander is the president and stockholder of Henry and Warren Corporation.

THE COURT: Okay. I didn't know that.

MS. OKRENT: It was represented—

THE COURT: First time I'm hearing that name. I don't know.

MS. OKRENT: I am sorry, your Honor. They were the attorneys for Henry and Warren Corporation.

THE COURT: Who were the attorneys?

MS. OKRENT: The attorneys that negotiated with the Department of Health on Mr. Hollander's and Henry and Warren's Corporation behalf.

THE COURT: Just one second. This gentlemen Mr. Hollander, you say he's the president of the Henry and Warren Corporation?

MS. OKRENT: Yes.

THE COURT: And they negotiated on his behalf or they

negotiated on behalf of Henry and Warren Corporation?

MS. OKRENT: Both.

THE COURT: Is Mr. Hollander a separate interest?

MS. OKRENT: He was the operator of Congress Nursing Home which was the nursing home that was being operated at the time, and we, Cobble Hill, replaced Mr. Hollander as operator of Congress Nursing Home. So Congress—

THE COURT: Did he have a financial interest in this other than perhaps a stockholder in a corporation, if in fact he owned the stock in the corporation?

MS. OKRENT: He had a financial interest in Henry and Warren Corporation, yes.

THE COURT: That's what I'm talking about. So the lawyers represent the Henry and Warren Corporation. They didn't represent Mr. Hollander in an individual capacity, did they?

MS. OKRENT: Yes, they were representing them both.

THE COURT: What financial interest did this man Hollander have, I do not understand? Tell me about it please. Maybe he's the necessary party here, I don't know. I'm hearing the name for the first time and I'm puzzled.

MS. OKRENT: Well, the financial interest that Mr. Hollander had back in 1976 was that he was being removed as the operator and that he was indicted and had to pay criminal fines. His income came from his corporation.

THE COURT: You are telling me something I'm learning for the first time. I don't know anything about this gentlemen Hollander being in indicted and having to pay fines, et cetera. And I don't know why you are telling me this.

I would hope that it is not expected to put any pressure upon me or to influence me adversely to the interest of the Henry and Warren Corporation. And I will assume that that's not the case. Because either way, I will assure you it will not influence me one way or the other.

I asked you a specific question. I want to know if this Mr. Hollander had a financial interest, separate and apart from the his ownership of any stock, since he's the president of the corporation? I would assume that he owned a fair amount, a fair percentage of the stock if not all of the stock, I don't know of this Henry and Warren Corporation.

MS. OKRENT: His financial interest was as a stockholder of Henry and Warren and he was the president.

THE COURT: Counselor, you know and I know that a corporation is an artificial entity created by operation of law and it is a separate entity. And that if I own all the stock in a corporation and the corporation has a cause of action, that corporation has to bring the cause of action, I cannot, despite the fact that I own a hundred percent of the stock, so that I have no financial interest in the outcome other than the interest that I have in the corporation. And so the lawyers who represented the Henry and Warren Corporation did exactly that, they represented that corporation and not this gentlemen, whose name comes up for first the time. Thank you.

Now what else do you want to tell me?

MS. OKRENT: I wanted to tell you about the testimony of Mr. Philip Scarlotta and Mr. Gerald Jazinski.

THE COURT: Who are they?

MS. OKRENT: They are the attorneys for the Department of Health who negotiated with the attorneys representing Henry and Warren Corporation with respect to the purchase option.

THE COURT: Okay.

MS. OKRENT: And they would testify to the fact that they had conversations, that they advised the attorneys for Henry and Warren Corporation, that—the language, applicable rules and regulations, meant the Medicaid reimbursement rules and regulations.

THE COURT: So I would ask them, why wasn't it stated specifically, as succinctly as you just stated it? Why wasn't it put in the contract in that language?

MS. OKRENT: Because the parties understood each other and thought it was clear at the time.

THE COURT: That's what you say, counselor. Now I say, why didn't they put it in such clear terms? You've put it in very clear terms.

MS. OKRENT: It is always true in contract terms with hindsight, things might have been stated more clearly. The question is what was the intent.

MR. VOLKELL: And their testimony—their testimony would have been that they and everyone who is negotiating

understood that phrase to mean those regulations.

THE COURT: I'll ask you then, Mr. Volkell, maybe you can answer the question, why didn't—why wasn't it stated in such nice, plain, simple language?

MR. VOLKELL: In hindsight that is not a well drafted clause of the contract. The parties who were negotiating all understood that was what they meant, they didn't foresee that anyone would say at a future time that well, what regulations? That was the only regulation that they understood it could possibly mean, they understood it to mean that, and, in hindsight I'm sure they wished they had said it more clearly.

THE COURT: Mr. Frost, do you agree that the lawyers representing your clients at the time understood that.

MR. FROST: Absolutely not, your Honor.

THE COURT: And you want to make an offer of proof?

MR. FROST: No, I do not want to make an offer of proof, I do not think it is appropriate. I do not think it could be admitted into evidence if they testified. But just for the record, since Mr. Volkell was so certain that everybody agreed, I spoke to Mr. Fischman by telephone when the issue arose and he told me he never understood it to be that, and he never agreed to that who represented the Corporation at the time.

THE COURT: Okay.

MS. OKRENT: Your Honor, I just want to understand your findings then. As I understand it, your finding is that parol evidence is not admissible—

THE COURT: Not under the circumstance of the language of this contract.

MS. OKRENT: We had one other point, one other position here which is under 8.03 of the receivership agreement, that there was a statute of limitations with respect to when a challenge to the price determination could be made. And that Henry and Warren did not challenge the determination in a timely fashion.

THE COURT: Do you want to say something on the subject?

MR. FROST: Yes, your Honor. We had numerous defenses that we raised to this contract. We entered a stipulation that we would raise our defense, waive our defense, they would waive their defense. That was the basis of the stipulation. And the

issue of methodology and the price was left to the Court. That was the stipulation. Based on that I entered, I waived the rest and various other defenses, your Honor, duress—

THE COURT: Either way, if I find the contract void first, then it is void in whole. I do not think its parts are severable, and that I can void one provision, such as the price, and then keep the rest of the provisions in there. So it rises and falls in all its parts. And so, therefore, whatever your application with regard to the statute of limitations, I deny it.

You will settle the findings of fact, conclusions of law and the judgment, and you will provide, as I've stated, for the continuance of this matter with respect to action number two, and the inclusion or addition of Cobble Hill Nursing Home, Incorporated, as a necessary party.

You will provide at the foot a blank date, in the year 1987, for a further hearing to determine the amount of monies that are owed. I almost said the amounts of money, if any, but it's already been acknowledged that there's at least a million four-hundred thousand or approximately that amount, that is owed by the State. But the State's position is that they have to channel it through Cobble Hill Nursing Home and that is why they have to be added as a necessary party. I think the word was conduit that was used. All right.

Thank you, counselors. I am going to hold on! To the exhibits for the timebeing and I will return them.

You can pick them up from the clerk after I sign the judgment.

(Court adjourned.)

APPENDIX L

THE BATTLE OF COBBLE HILL
Gov goes to bat for anxious old folks
By LUCETTE LAGNADO

Gov. Cuomo vowed yesterday to "throw everything we can into the fight" to save the endangered Cobble Hill Nursing Home from falling back into the hands of convicted swindler Eugene Hollander.

Cuomo said he has asked state Attorney General Robert Abrams to make a personal appeal in the courts on behalf of the state Health Department to protect the downtown-Brooklyn nursing home, whose 520 elderly patients are facing eviction.

A spokesman for Abrams last night said the attorney general would "explore every possible avenue" to help the nursing-home residents.

Gov vows to save nursing home from convicted czar

The governor's intervention followed an exclusive Post story revealing that Hollander—who figured prominently in the nursing-home scandals of the 1970s—was seeking to give the frail seniors the boot.

The Post also disclosed that Hollender was seeking a more-than-tenfold monthly increase, from $18,000 to $200,000, in the months before the planned eviction.

"It's 500 elderly people—how do you let them out on the street so somebody can make a big profit?" Cuomo angrily asked The Post.

Special Nursing Home prosecutor Edward Kuriansky, whose office prosecuted Hollander for nursing-home fraud 13 years ago, vowed to "re-examine the entire record" of the notorious nursing-home czar.

"It would be unthinkable if these elderly nursing-home residents were displaced from the only home they know," Kuriansky said.

Hollander was convicted in 1976 of stealing more than $1 million in Medicaid funds—some of which he used to purchase

Renoir and other fine paintings for his Fifth Avenue apartment.

The Auschwitz survivor was said to have run his nursing homes like a concentration camp—depriving elderly residents of adequate food, medication, linen, blankets and other supplies, according to witnesses who testified before a series of investigatory panels.

Under state law, his property could not be taken away from him, and he retained ownership of the Cobble Hill Nursing Home, which he leased to a volunteer group from the community.

Kuriansky said he will determine if Hollander broke any of the terms of his 1976 sentencing and plea-bargaining agreement, which mandated that he have no "direct or indirect" dealings with the nursing-home business.

Kuriansky praised both The Post and City Council President Andrew Stein for "alerting the public to this difficult problem."

Stein, who first helped uncover the nursing-home scandals as a state assemblyman, warned that "a terrible tragedy will occur" if Hollander succeeds in booting out the helpless seniors.

"To let Eugene Hollander once again make a profit on the misery of seniors would be wrong," Stein declared.

Stein also blasted Brooklyn Supreme Court Judge Gerald Held, who has handed the convicted swindler a series of courtroom victories in recent years, calling the magistrate's decisions "disgraceful and indecent."

Held granted Hollander's firm the right to take possession of the nursing home from the volunteer board that controls it, and order it vacated within six months.

Held could not be reached for comment.

Meanwhile, Charles Hynes, a candidate for Brooklyn district attorney who prosecuted Hollander in 1976, told The Post he did not believe "a heck of a lot can be done" to stop Hollander's eviction plans.

"Obviously I feel very badly about the old people," said Hynes. "But convicted felons are entitled to own property."

APPENDIX M

[Letterhead of State of New York, Department of Health, Office of Health Systems Management]

November 26, 1979

Mr. Thomas J. Douglas
Cullen & Dykman
177 Montague Street
Brooklyn, New York 11201

Re: Cobble Hill Nursing Home

Dear Mr. Douglas:

This is in response to your request for our determination of the Initial Price for Cobble Hill Nursing Home pursuant to paragraph 9.02 of the Receiver Agreement dated May 17, 1976. Since the price must be determined "in accordance with the Public Health Law and all applicable rules and regulations of the Department," there follows a computation of the Medicaid allowable transfer price which is the Initial Price as called for by the Receiver Agreement.

The Medicaid allowable transfer price (as well as Medicaid reimbursement for capital cost) is based upon the original historical cost of a facility as reported to the Department, subject to Departmental review. The original historical cost of a facility is also called the initial allowed facility cost and is defined in 10 NYCRR 86-2.21(a)(6). This cost serves as the basis for a capital cost component in the Medicaid reimbursement rate determined pursuant to 10 NYCRR 86-2.21(e). As reimbursement is made, the unreimbursed value continually shrinks.

Detailed below is a computation of the unreimbursed value of the subject facility as of January 1, 1980 which is the Medicaid allowable transfer price on that date, and is also, therefore, the Initial Price on that date. All historical costs used in the computation are costs abstracted from audits performed by the Department's Bureau of Audit and Investigation for the cost years 1971 through 1973.

The recognizable transfer amount (and thus the Initial Price) would be further reduced for a sale occurring after January 1, 1980 due to the additional payment of capital reimbursement.

Computation of Recognizable Transfer Consideration

Description	*Historical Cost*	*Depreciation/ Amortization Reimbursement Paid to 12/31/79*	*Unreimbursed Value 1/1/89*
Land	$ 67,456	—	$ 67,456
Old Building	1,998,763		
New Building	1,896,058	$1,077,309	2,978,896
Non-Movable Equipment	161,384		
TOTAL	$4,123,661	$1,077,309	$3,046,352

I trust that the above information will be of assistance to you.

Very truly yours,
s/ William J. Gormley
William J. Gormley
Director
Bureau of Residential Health
Care Facility Reimbursement

cc:
Henry and Warren Corp.
c/o Eugene Hollander
980 Fifth Avenue
New York, New York 10021

Shea, Gould, Climenko,
Kramer and Casey
330 Madison Avenue
New York, New York 10017

No. 89-1863

Supreme Court, U.S.
FILED
JUN 20 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States
October Term, 1989

THE HENRY & WARREN CORPORATION,
Petitioner,

—v.—

COBBLE HILL NURSING HOME, INC., and DAVID AXELROD, M.D., COMMISSIONER OF THE STATE OF NEW YORK DEPARTMENT OF HEALTH,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BEST AVAILABLE COPY

Question Presented

Should this Court issue its writ of certiorari to review the decision of a state court that did no more than apply principles of state law to find that a disputed price term of a contract was sufficiently definite to be enforced and direct entry of summary judgment of specific performance?

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Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Preliminary Statement

Respondents, Cobble Hill Nursing Home, Inc. and David Axelrod, M.D., Commissioner of the State of New York Department of Health, respectfully request that the Petition for a writ of certiorari to the Court of Appeals of the State of New York be denied.[1]

[1] Pursuant to Rule 29.1 Cobble Hill Nursing Home, Inc., states that it has no parent company, subsidiaries or affiliates.

Statement of the Case

A. The Petition and Jurisdiction of this Court.

Petitioner seeks a writ of certiorari to review the unanimous decision of the Court of Appeals of the State of New York that did no more than enforce, solely on grounds of state law, a contract between private parties for the sale of real property. No question of federal law was presented to or decided by the Court of Appeals, "necessarily" or otherwise. Petitioner does not claim that review by this Court is necessary to resolve any conflict among lower courts or to settle any question of general importance.

Petitioner's allegations that it was deprived of constitutional due process lack merit and bear no relationship either to the facts underlying the litigation or to the basis of decision in the court below. The decision for which review is sought set forth a standard by which to assess the definiteness of a contractual provision as a prerequisite to enforceability under New York law. Having refined that legal standard and applied it to the contract before it, the court determined the contract to be enforceable as a matter of law, there being no genuine issues of material fact, and directed an appropriate judgment of specific performance. The decision of the New York Court of Appeals presents no federal question that would confer jurisdiction on this Court and offers no issues of constitutional dimension, much less of importance, to merit this Court's attention. The petition for certiorari is patently without merit and should therefore be denied.

For more than a decade Petitioner has resisted performance of a contract that it freely entered into in order to prevent the incarceration of its principal, Eugene Hollander, and it continues that dilatory process with this frivolous

petition. The frivolous nature of the petition, and its obvious interposition solely to delay vindication of Respondents' rights, warrant the exercise of this Court's discretion under Rule 42.2 to award Respondents their just damages and double costs.

B. Background Facts.

In the mid-1970's a special investigation of fraud and conditions of care in the nursing home industry in New York resulted in regulatory reform and criminal fraud prosecutions. One of the principal figures and eventual targets of that investigation was Eugene Hollander, the president and, with his wife, the owner of Petitioner, The Henry and Warren Corporation ("Henry & Warren"). Henry & Warren was the owner of real property in Brooklyn, New York on which Hollander operated a 520-bed facility known as the Congress Nursing Home. (R.1a-2a).

In July 1975 Hollander was indicted by state and federal grand juries for crimes involving false claims for reimbursement for health and medical care for patients in his nursing homes. The indictments placed his operating certificates in jeopardy and Hollander requested that the New York State Department of Health (the "Department") appoint receivers to operate the homes. (R.2a). Negotiations ensued, but no receivers had yet been appointed when, in May 1976, Hollander entered a guilty plea to the federal charges and was sentenced to a five-year term of imprisonment and fined $10,000. The prison term was suspended and Hollander was placed on probation for five years on a condition that he "divest himself of all connection, direct or indirect, with any occupation that requires the custody or care of other people." (R.3a; 15a).

Hollander earlier had entered a plea of guilty to the state charges, but sentencing was delayed pending the outcome of the receivership negotiations. On May 17, 1976, the eve of the state sentencing hearing, Hollander and Henry & Warren entered into a lease and a receivership agreement with Respondent Cobble Hill Nursing Home, Inc. ("Cobble Hill"). (R.3a). Cobble Hill was formed by a group of local residents as a not-for-profit corporation specifically as an effort to save an important community institution. By having entered into these agreements Hollander was able to represent to the state court in the following day's sentencing hearing that he had removed himself from nursing home operations. The state court sentenced Hollander to five years' probation conditioned on payment of a fine of $250,000 and $1,000,000 restitution to the State, as well as permanent divestiture of all his nursing home interests. (R.4a).

The lease and the receivership agreement (collectively, the "Agreements") each contained, independently and by express incorporation of the other, a provision whereby Cobble Hill was granted an option to purchase the property from Henry & Warren at a price to be determined by the Department in accordance with applicable law and regulations. (R.3a; 15a). In the fall of 1979, Cobble Hill requested such a price determination. The Department calculated this price by relying on the regulations and formulas by which it valued real property for purposes of capital cost reimbursement under the Medicaid program. Under these rules an allowable transfer price is limited to the historical cost of the property less payments received by the owner as a return of its invested equity. After performing these calculations the Department stated that the purchase price as of January 1, 1980 was $3,046,352, to be reduced by any further reimbursement paid to Henry &

Warren for capital costs prior to a sale closing. Cobble Hill then exercised its option to buy the property. (R.4a).

Henry & Warren refused to perform its contract to sell the property at the price so determined. Rather than pursue the express remedy provided by the Agreements, a state law proceeding for review of the Department's determination, Henry & Warren brought an action in the United States District Court for the Eastern District of New York seeking to rescind the Agreements, alleging that it had been coerced and thus denied due process under the Constitution. The District Court dismissed Henry & Warren's claims under federal law for failure to state a claim and dismissed its state law claims for lack of pendent jurisdiction. (R.4a; 16a). Henry & Warren did not appeal from that judgment.

C. Nature of the Action

In June 1980, Cobble Hill commenced this action seeking specific performance of the purchase option in the Agreements. A separate action was commenced by Henry & Warren against the Department, later consolidated with that of Cobble Hill, in which Henry & Warren asserted, *inter alia,* that the Department acted improperly in fixing the purchase price at less than fair market value. (R.5a; 16a-17a).

D. The Proceedings Below.

On October 11, 1985 the Supreme Court, Kings County granted a motion by Cobble Hill for summary judgment, on a stipulation by the parties in open court, as to all questions of law, reserving for later determination "financial matters," such as the particular formulas and base calculations applied by the Department. On December 16, 1986, the scheduled date of trial on these issues, the trial court *sua*

sponte vacated the summary judgment stipulation, dismissed Cobble Hill's complaint and granted judgment to Henry & Warren. The purported ground for that action was the court's stated view that the delegation to a third party of a price determination with reference to applicable rules resulted in a failure, under its view of New York law, to state an essential contractual term and rendered the Agreements unenforceable. The court declined to hear evidence of the parties' intent as to this "ambiguous" term and refused to entertain argument on Cobble Hill's position that Henry & Warren's failure timely to challenge the Department's price determination in the manner provided in the Agreements barred its belated objections to enforcement of the purchase option. (R.5a; 17a-18a).

On appeal, the Appellate Division, Second Department, affirmed by a divided panel. (R.5a; 11a-22a). The same panel denied a motion by Cobble Hill for permission to appeal to the New York Court of Appeals. (R.28a). A similar motion by Cobble Hill to the Court of Appeals itself was dismissed on a jurisdictional ground, that the order appealed from did not "finally determine" the action. (R.27a). Cobble Hill then moved to reargue the dismissal of its motion for permission to appeal.

The "finality" of the earlier judgment meanwhile was demonstrated by the entry of an order by the trial court requiring Cobble Hill to vacate the nursing home property within six months and by entertaining a motion to increase, by a factor of ten, the rent Cobble Hill was to pay to Henry & Warren pending its eviction. The Court of Appeals granted the motion for reargument, vacated its earlier dismissal and granted permission to appeal. (R.6a). The court granted the Department leave to intervene in the appeal.

When the Court of Appeals considered the merits, it reversed the decisions below. After interpreting New York contract law, and stating the standard of definiteness required to enforce a contract, the court found that the parties to the Agreements had satisfied the standard, had manifested an intent to be bound and had provided a method for determining the purchase price without a need for any new expression by the parties. The court found that the purchase option contract was therefore enforceable on its terms and, the subject matter being the conveyance of real property, directed the entry of a judgment of specific performance (R.7a-10a), in accordance with familiar New York law.

A motion by Henry & Warren for reargument of the court's decision was denied. [Not reproduced in the Appendix.]

Reasons for Denying the Writ

This petition seeks review of a decision of the highest court of the State of New York that resolved a dispute about the interpretation of a contract by deciding and applying principles of state law. No questions of federal law were raised by Petitioner in its appeal nor were such questions passed upon in the decision below. The grounds for the writ now asserted by Petitioner, that it was deprived of its right to due process, in the form of a denial of a hearing as to (i) certain evidentiary issues and (ii) the "equity" of the relief ordered, raise no substantial issues of federal law.

1. The decision below rests entirely on state law.

This Court's jurisdiction to review the decisions of state courts is restricted to those in which federal questions are an issue. *See* 28 U.S.C. § 1257(a) (1984). Absent an affirmative showing that federal questions were necessarily

presented and passed upon by the state court, this Court should deny the petition for certiorari. *See Honeyman* v. *Hanan,* 300 U.S. 14, 18 (1937); *accord Lynch* v. *New York,* 293 U.S. 52, 54 (1934).

Contract law, and decisions that do no more than develop and apply contract principles, properly are determined solely as a matter of state law. *Memphis Natural Gas Co.* v. *Beeler,* 315 U.S. 649, 654 (1942). This case concerns only the interpretation and enforceability of a contract. The dispute on appeal was whether the contract's price term was sufficiently definite, with the consequence that the contract was to be either enforced or declared a nullity. The Court of Appeals conclusively determined that dispute and no more. No question of federal law was presented to or decided by the court below.

2. Petitioner raises no substantial constitutional question concerning the propriety of summary judgment on this record.

Petitioner claims a deprivation of due process by reason of the grant of summary judgment by the Court of Appeals on the record before it. The decision by the Court of Appeals was a straightforward application of orthodox summary judgment procedures on the strength of a record devoid of a genuine issue of material fact in the light of state substantive law; it presents not even a colorable issue of due process.

The specific evidence that Henry & Warren claims it was given no opportunity to present is irrelevant to the judgment of the court below. As a matter of substantive state contract law, if a contract is unambiguous then parol evidence of the subjective intent of the parties when entering into the agreement is inadmissible to vary the contract's terms.

Judnick Realty Corp. v. *32 West 32nd St. Corp.*, 61 N.Y.2d 819, 822, 462 N.E.2d 131, 133, 473 N.Y.S.2d 954, 956 (1986); *Mallad Constr. Corp.* v. *County Fed. Sav. & Loan Ass'n*, 32 N.Y.2d 285, 290-91, 298 N.E.2d 96, 99-100, 344 N.Y.S.2d 925, 929-31 (1973). The Court of Appeals expressly found that "[t]he terms of agreement and the appropriate remedy can be readily determined, and it is plain that the parties intended this to be a complete and binding contract." (R.9a). Petitioner's assertions respecting its intent, or absence thereof, on how the Department was to calculate the purchase price (Petition at 6-7) thus miss the mark.

The court below specifically addressed and rejected the argument that Petitioner's subjective intent as to the price term could be proved to avoid its obligation: "[I]t is apparent from the agreement that these parties reposed discretion in the Department to make the price determination, limited only by the requirement that it apply provisions that were suitable, pertinent and appropriate for the task at hand." (R.8a). Henry & Warren objects in reality, not to a lack of opportunity to be heard, but to its failure, having been heard, to persuade the Court of Appeals of the merits of its arguments.

Equally without substance is Henry & Warren's claim that the court below deprived it of due process by functioning as a court of equity and directing the entry of summary judgment granting Respondent Cobble Hill specific performance without further evidentiary hearings. Petitioner invokes the body of maxims of equity jurisprudence in aid of this contention. But the application of those maxims to the facts of record in order to devise an appropriate remedy is entirely a matter of state, not federal, law; the jurisdictional barrier erected by that fact is not avoided by Peti-

tioner's argument. Nor does a bare allegation that a state court of equity failed to "do justice" on the merits transform Petitioner's disgruntlement into an issue of due process, and Henry & Warren fails to demonstrate that the elements of due process were lacking in the hearing it received.

Petitioner is in error when it asserts the existence of an established constitutional requirement in every case involving an equitable remedy that a court, having found that remedy to be appropriate and warranted, must order a subsequent evidentiary hearing on the identical issues. As a matter of New York state contract law, where the subject matter of a contract is the sale of real property, specific performance is a customary and appropriate remedy in a successful action for a breach of the contract. *See, e.g., S.E.S. Importers, Inc.* v. *Pappalardo,* 53 N.Y.2d 455, 468, 425 N.E.2d 841, 848, 442 N.Y.S.2d 453, 460 (1981); *Judnick Realty Corp.* v. *32 West 32nd St. Corp.,* 61 N.Y.2d 819, 823, 462 N.E.2d 131, 133, 473 N.Y.S.2d 954, 956 (1984); *Van Wagner Advertising Corp.* v. *S&M Enters.,* 67 N.Y.2d 186, 192, 492 N.E.2d 756, 759, 501 N.Y.S.2d 628, 631 (1986).

Moreover, the state court considered the matters now raised by Henry & Warren in its petition and rejected them on the merits. The court found that Henry & Warren freely entered into the Agreements with Cobble Hill and received the bargained for consideration (R.8a-9a) and that Petitioner's "contention that, under this agreement, it is somehow entitled to the equivalent of fair market value is simply without substance." (R.9a). After explicitly addressing the definiteness of the price term and the parties' clear intent to be bound by the contract, the court concluded that "to declare this defendant's promise legally meaningless—thus allowing it to walk away with its property after enjoying the benefits of the bargain—defeats the reasonable

expectations of the parties in entering into the contract and is a misuse of the indefiniteness doctrine." (R.9a). Petitioner's claim that it was not afforded an opportunity to address these issues does not accord with the facts. Its assertion that due process requires a second hearing of the same issues is absurd.

In sum, Petitioner improperly seeks review by this Court of the judgment of a state court where that court was neither presented with nor passed upon any question of federal law. Henry & Warren had the opportunity of a hearing to present each of the issues recited in the petition and its contentions were rejected in or rendered irrelevant by the view of state substantive law adopted by the Court of Appeals. Henry & Warren's petition should be denied.

The Court Should Award Damages Against Petitioner Under Rule 42.2

Rule 42.2 of this Court provides that:

> When a petition for a writ of certiorari, an appeal or application for other relief is frivolous, the Court may award the respondent or appellee just damages and single or double costs. Damages or costs may be awarded against the petitioner, appellant, or applicant, or against the party's attorney or against both.

The Petitioner has stated no grounds to invoke the jurisdiction of this Court, has misrepresented the facts regarding the issues presented to and decided by the court below and has asserted no colorable legal grounds for the arguments by which certiorari is sought.

Moreover, the Court of Appeals carefully traced the decade-long effort by Petitioner to avoid its responsibility to

convey the nursing home to Cobble Hill under the Agreements (R.1a-6a) and alluded to the "human drama" (R.1a) that threatened the housing of "more than 500 elderly residents." (R.6a). The submission of this transparently frivolous petition can only be for the purpose of further delay at continued cost to Respondents, to the residents of the nursing home and to the courts. An exemplary and compensatory award of damages and double costs to Respondents is fully justified and is hereby requested.

Conclusion

For the reasons set forth above, Respondents Cobble Hill Nursing Home, Inc. and David Axelrod, M.D., Commissioner of the State of New York Department of Health respectfully request that the instant petition for a writ of certiorari to review the decision of the Court of Appeals of the State of New York be denied and that Respondents be awarded appropriate damages and double costs pursuant to Rule 42.2 of the Rules of the Supreme Court.

Respectfully submitted,

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